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AND
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No. _____

In the
Supreme Court of the United States

CONESTOGA WOOD SPECIALTIES CORP., et al.,
Petitioners,

v.

KATHLEEN SEBELIUS, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal regulations implementing the Patient Protection and Affordable Care Act of 2010 (ACA) compel certain employers, including Petitioners, to provide health-insurance coverage for FDA-approved contraceptives. *See* 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012) ("the Mandate").

Petitioners, a family of five Mennonites and their closely-held, family-run woodworking corporation, object as a matter of conscience to facilitating contraception that may prevent the implantation of a human embryo in the womb, and therefore brought this case seeking review of the Mandate under the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act of 1993.

The decision below rejected these claims, carving out an exception to the scope of religious free exercise. The court denied that either "a for-profit, secular corporation" or its family owners could claim free exercise rights. Pet. App. at 10a. In so holding, the Third Circuit expressly rejected contrary decisions of the Ninth and Tenth Circuits, and ruled at odds with prior decisions of the Second Circuit and Minnesota Supreme Court, but accorded with a recent decision of the Sixth Circuit.

The question presented is:

Whether the religious owners of a family business, or their closely-held, for-profit corporation, have free exercise rights that are violated by the application of the contraceptive-coverage Mandate of the ACA.

PARTIES TO THE PROCEEDING

Petitioners are Conestoga Wood Specialties Corp. and its family owners, Norman and Elizabeth Hahn, and their three sons, Norman Lemar, Anthony, and Kevin Hahn.

Respondents are the Departments of Health and Human Services, Treasury, and Labor, and the Secretaries thereof, Kathleen Sebelius, Jacob Lew, and Thomas E. Perez, respectively, sued in their official capacities. During the litigation below, the Secretaries of the Treasury and Labor Departments were replaced by Mr. Lew and Mr. Perez, respectively.

CORPORATE DISCLOSURE STATEMENT

Petitioner Conestoga Wood Specialties Corp. is a Pennsylvania business corporation. It does not have parent companies and is not publicly held.

Petitioners Norman, Elizabeth, Norman Lemar, Anthony, and Kevin Hahn are individual persons.

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INTRODUCTION

Petitioners, a Mennonite family and their closely-held, family-run woodworking business, object as a matter of conscience to facilitating certain contraceptives that they believe can destroy human life. Regulations promulgated under the Patient Protection and Affordable Care Act of 2010 (ACA), however, compel employers with more than fifty full-time employees to provide health-insurance coverage, and compel most kinds of insurance plans to cover abortifacients among other FDA-approved contraceptives. Petitioners challenged the regulation as burdening their free exercise of religion under the First Amendment and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.* The decision below rejected those claims, holding as a "threshold" matter that neither a "for-profit, secular corporation" nor its proprietors have free exercise rights in their business activities, Pet. App. at 10a, and that no cognizable burden falls on the Mennonite family that owns and runs the closely-held business, *id.* at 26a–27a.

The Third Circuit's decision below squarely conflicts and "respectfully disagree[s]" with the Tenth Circuit's contrary holding recognizing two for-profit corporations' religious exemption from the very same regulation. *Id.* at 19a n.7. It also "decline[s] to adopt the [Ninth Circuit's] theory" allowing a business' family owners to claim free exercise rights as passing through the corporate form, and likewise refuses to recognize the proprietors' claim of a burden on their own free exercise rights. *Id.* at 25a. And it diverges from

decisions of the Second Circuit and Minnesota Supreme Court that entertained similar free exercise claims by proprietors and their for-profit corporations. *Id.* at 67a n.21. A recent decision by the Sixth Circuit adopting, in large part, the Third Circuit's analysis and holding that neither family owners nor their closely-held businesses may seek free exercise protection from the Mandate further entrenches the existing circuit conflict. *See Autocam Corp. v. Sebelius*, No. 12-2673, 2013 WL 5182544, at *4–9 (6th Cir. Sept. 17, 2013).

As the Solicitor General noted two terms ago in petitioning for certiorari, the enforceability of the ACA "involves a question of fundamental importance." *Dep't of Health & Human Servs. v. Florida*, Pet. for a Writ of Cert. at 29, (No. 11–398) (Sept. 2011). Family business owners and corporations incorporated in the Third Circuit, including the many incorporated in the State of Delaware, are denied the free exercise protections enjoyed by those in several other circuits, encouraging forum-shopping and distorting the market for incorporation. They urgently need this Court's guidance and this case is a clean vehicle for clarifying free exercise law. Further review by this Court is warranted.

DECISIONS BELOW

The panel opinion of the court of appeals is not yet reported but is available at No. 13–114, 2013 WL 3845365 (July 26, 2013) and reprinted in Pet. App. at 1a–93a. The Third Circuit's order denying rehearing en banc is unreported but reprinted in

Pet. App. at 1c–2c. The district court's opinion is reported at 917 F. Supp. 2d 394 (E.D. Pa. 2013) and reprinted in Pet. App. at 1b–45b.

JURISDICTION

The court of appeals issued an opinion on July 26, 2013 and denied a timely petition for rehearing *en banc* on August 14, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ....

U.S. CONST. Amend. I

The Religious Freedom Restoration Act of 1993 provides that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," 42 U.S.C. § 2000bb–1(a), unless "it demonstrates that the application of the burden to the person—(1) is in the furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest," 42 U.S.C. § 2000bb–1(b).

"[T]he term 'exercise of religion' means religious exercise, as defined in section 2000cc–5 of this title." 42 U.S.C. § 2000bb–2(4). "The term 'religious

exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc–5(7). "Federal statutory law adopted after November 16, 1993 is subject to this chapter unless such law explicitly excludes such application by reference to this chapter." 42 U.S.C. § 2000bb–3(b).

The Dictionary Act provides, in relevant part, that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise," the word "person ... include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1.

The Patient Protection and Affordable Care Act of 2010 states, in relevant part, that "[a] group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for ... (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph." 42 U.S.C. § 300gg–13(a) & (a)(4).

Other relevant statutory provisions are excerpted in Pet. App. at 1e–18e. Pertinent regulatory provisions are excerpted in Pet. App. at 1f–19f

STATEMENT OF THE CASE

I. Factual Background

Petitioners Norman and Elizabeth Hahn and their three sons, Norman Lemar, Anthony, and Kevin Hahn, are devout Mennonite Christians who integrate their faith into their daily lives, including their work. As part of their Mennonite faith, they oppose taking any human life. The Hahns view artificially preventing the implantation of a human embryo as an abortion. As the government has conceded, a number of FDA-approved contraceptives may work by inhibiting the implantation of an embryo in the womb. *See, e.g., Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1123 n.3 (10th Cir. 2013) (en banc) (noting the government's concession that some FDA-approved contraceptives "have the potential to prevent uterine implantation"); FDA, Birth Control: Medicines To Help You, *available at* http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications /ucm313215.htm (last visited Sept. 11, 2013) [excerpted in Pet. App. at 1i–5i] (stating that Plan B, Ella, and certain intrauterine devices (IUDs) may "prevent[]" "implant[ation]"). The Hahns accordingly object to facilitating their use. Pet. App. at 3g, 10g–11g, 22g–23g.

For decades, the Hahn family has solely owned and operated petitioner Conestoga Wood Specialties Corporation, a for-profit corporation based in Lancaster County, Pennsylvania. Conestoga makes doors and other wooden parts for kitchen cabinets. Conestoga has provided generous health benefits, including preventative care coverage that went

beyond what was required by law, to its 950-plus employees, but omitted coverage of abortifacients. *Id.* at 3g, 10g–11g, 21g. Its Board of Directors has adopted "The Hahn Family Statement on the Sanctity of Human Life," proclaiming the family's "belie[f] that human life begins at conception" and "our moral conviction [against] be[ing] involved in the termination of human life through abortion ... or any other acts that involve the taking of human life." *Id.* at 22g–23g. Because Conestoga Wood is organized under subchapter S of the Internal Revenue Code, its income is not taxed at the corporate level but passes through to its owners. *Id.* at 3h–5h.

II. Statutory Background

In 2010, Congress passed the ACA. PUB. L. NO. 111–148, 124 Stat. 119 (2010). The ACA mandates that many health-insurance plans cover preventive care and screenings without requiring recipients to share the costs. 42 U.S.C. § 300gg–13(a)(4). The ACA exempts grandfathered plans (those having made minimal changes since 2010) from its preventive-care mandate, and ACA regulations exempt churches and their integrated auxiliaries from having to cover contraceptives or sterilization. 42 U.S.C. § 18011; 45 C.F.R. § 147.131. The ACA does not require companies with less than fifty employees to offer insurance coverage. 26 U.S.C. § 4980H.

Though Congress did not require contraceptive coverage in the ACA's plain text, the Department of Health and Human Services incorporated guidelines formulated by the private Institute of Medicine

(IOM) into its preventative-care regulations. *See* Pet. App. at 10a–11a. The IOM guidelines mandate that Petitioners include all FDA-approved contraceptives, sterilization procedures, and related counseling in their healthcare plan. *Id.* at 11a, 35a–36a; *see also* 45 C.F.R. § 147.130; 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012). Employers that violate the Mandate face government lawsuits under ERISA and fines of up to $100 per plan participant per day. 29 U.S.C. § 1132; 26 U.S.C. § 4980D. Multiplied by at least 950 employees, the financial penalty here is roughly $35 million per year, an amount that would "rapidly destroy [Conestoga's] business and the 950 jobs that go with it." Pet. App. at 36a. If Conestoga attempted to avoid these fines by dropping its healthcare plan altogether, it would still incur a massive government penalty "of $2,000 per full-time employee per year (totaling $1.9 million)," as well as put itself at a steep competitive disadvantage in the marketplace. *Id.* at 36a n.4 (citing 26 U.S.C. § 4980H).

III. Proceedings Below

Petitioners filed suit in the U.S. District Court for the Eastern District of Pennsylvania, challenging the Mandate under the First Amendment's Free Exercise Clause and RFRA and seeking declaratory and injunctive relief. Pet. App. at 23g–27g.[1] They moved for a temporary restraining order and

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[1] The complaint also alleges violations of the Establishment Clause, the Free Speech Clause, the Fifth Amendment Due Process Clause, and the Administrative Procedure Act. Pet. App. at 27g–33g. Petitioners relied only on RFRA and the Free Exercise Clause in their preliminary injunction motion.

preliminary injunction before their health plan was set to renew on January 1, 2013.

The district court first granted the temporary restraining order but later denied the preliminary injunction. *Id.* at 45b. It held that Conestoga, as a for-profit corporation, could not exercise religion under the First Amendment or RFRA and that the contraceptive-coverage Mandate did not substantially burden the Hahn family's religious exercise. *Id.* at 18b–22b, 32b–38b. Lacking injunctive relief, Conestoga's health issuer inserted coverage of the contraceptives into their plan over Petitioners' objection, because the issuer sought to avoid penalties on itself. Petitioners' only other option to avoid the Mandate at that point would have been to immediately drop all health insurance coverage for their 950 employees and their families, which also would have violated Petitioners' religious principles, devastated their work force, and compromised Conestoga's competitive position in the marketplace.[2] Pet. App. at 11g, 14g–15g, 21g–22g.

Petitioners timely appealed and moved for an injunction pending appeal. A divided panel of the court of appeals denied the injunction pending appeal. *Conestoga Wood Specialties Corp v. Sec'y of U.S. Dep't of Health & Human Servs.*, No. 13-1144, 2013 WL 1277419 (3d Cir. Feb. 8, 2013). A second

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[2] *See also* Pet. App. at 91a ("Faced with ruinous fines, the Hahns and Conestoga are being forced to pay for ... offending contraceptives, including abortifacients, in violation of their religious convictions ...."); 26 U.S.C. § 4980H (imposing substantial fines on any "large employer" that fails to provide health insurance coverage to full-time employees).

divided panel of the Third Circuit affirmed the district court's denial of the preliminary injunction. Pet. App. at 29a. As a "threshold" matter, it held that "for-profit, secular corporations cannot engage in religious exercise" under the First Amendment or RFRA. *Id.* at 10a. In so doing, it "respectfully disagree[d]" with the Tenth Circuit's contrary holding on the very same regulation. *Id.* at 19a n.7 (citing *Hobby Lobby*, 723 F.3d 1114). It also "declined to adopt the *Townley/Stormans* theory," in which the Ninth Circuit allowed corporations to claim the free exercise rights of their family owners, which pass through the corporate form when the family implements their religious beliefs in an incorporated business. *Id.* at 25a (discussing *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 619–20 (9th Cir. 1988), and *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119–20 (9th Cir. 2009)).

The panel further rejected the Hahns' own claims because the contraceptive-coverage Mandate imposes its commands and penalties on Conestoga, "a legally distinct entity," *id.* at 30a, not directly on the Hahns, *id.* at 28a–29a. The panel expressly declined to reach the equitable factors governing preliminary injunctions, relying exclusively on the merits holdings above, thus establishing a *per se* rule that free exercise protections are unavailable to for-profit businesses and their owners. *Id.* at 29a.

Judge Jordan dissented. He noted that the majority's suggestion that only natural persons, not corporations, can exercise religion conflicts with this Court's precedents. *Id.* at 50a–54a. "[N]umerous Supreme Court decisions have recognized the right

of corporations to enjoy the free exercise of religion." *Id.* at 50a–51a (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525–26 (1993); *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 330 (1987); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.29 (1983)); *see also O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 973 (10th Cir. 2004), (a "New Mexico corporation"), *aff'd by Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 772 (6th Cir. 2010) (an "ecclesiastical corporation"), *rev'd by Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012). Religious believers routinely associate and organize to exercise religious rights collectively. Pet. App. at 55a. And RFRA explicitly extends to corporations through the Dictionary Act. *Id.* at 71a n.23.

Judge Jordan likewise explained that the exercise of religion is not confined to non-profit corporations. *Id.* at 61a–65a. Precedents of this Court and others have allowed entrepreneurs to challenge laws, such as Sunday-closing laws, on free exercise grounds. *Id.* at 65a (citing *Braunfeld v. Brown*, 366 U.S. 599, 601 (1961) (plurality op.)). And other areas of First Amendment law, including the free speech doctrine, recognize that "First Amendment protection extends to corporations," *id.* at 53a–54a (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342 (2010)), "*both for-profit and nonprofit*," *id.* at 63a (quoting *Citizens United*, 558 U.S. at 354 (emphasis in original)). Judge

Jordan thus found that both Conestoga and the Hahns could raise free exercise claims and that the Mandate imposes a substantial burden on them by forcing them to comply or have their business face significant penalties. *Id.* at 75a–79a.

He further concluded that the Mandate failed strict scrutiny and was not generally applicable because the government already exempts many health-insurance plans from the contraceptive-coverage Mandate, undermining its argument against accommodating Petitioners. *Id.* at 82a–84a. And the government failed to prove that the Mandate was the least restrictive means of promoting access to contraception. *Id.* at 84a–87a.

By a vote of 7 to 5, the Third Circuit denied a timely petition for rehearing en banc. *Id.* at 2c. This petition follows.

REASONS FOR GRANTING THE WRIT

In holding that neither for-profit corporations nor their proprietors can ever exercise religion within the meaning of the Free Exercise Clause or RFRA, the Third Circuit created a circuit conflict on an issue of vital national importance. The decision below expressly rejected contrary decisions of the Ninth and Tenth Circuits, the latter of which involved the very same challenge to the very same regulation. As the dissent noted, the majority also failed to follow contrary decisions of the Second Circuit and the Minnesota Supreme Court. The Third Circuit's ruling is at odds not only with this Court's free exercise cases involving corporations

and entrepreneurs, but also with other areas of First Amendment law such as the freedom of speech. Now that the Tenth Circuit has ruled en banc and the Third Circuit has refused to rehear this case en banc, the conflict is firmly entrenched.

The scope for enforcing the ACA is a question of exceptional importance, as this Court recognized two terms ago in reviewing the law's individual-coverage mandate. The contraceptive-coverage Mandate is no less important, pitting freedom of conscience against purported nationwide uniformity. Review cannot wait, as the contraceptive-coverage Mandate is already in effect.

This case is a clean vehicle for reviewing the issue: the relevant facts are undisputed, and the issue was briefed, argued, and squarely ruled on below. Moreover, Petitioners exemplify the case for protecting free exercise: their woodworking business is closely held and has been owned and operated by the same Mennonite family for decades. Further review by this Court is warranted.

I. Circuits Are in Conflict Over Whether Corporations or Their Proprietors May Challenge Substantial Burdens upon Their Free Exercise of Religion.

In its decision below, the Third Circuit expressly declined to follow contrary decisions of the Ninth and Tenth Circuits, even though the Tenth Circuit vindicated a corporation's free exercise challenge to the exact same regulation. The dissent further noted that the panel opinion was at odds with decisions of

the Second Circuit and Minnesota Supreme Court. The Third and Tenth Circuits' opportunity to consider the matter en banc and a recent decision by the Sixth Circuit largely mirroring the Third Circuit's analysis have entrenched the conflict. Only this Court can resolve it.

A. The Third Circuit's Decision Openly Conflicts with Decisions of the Ninth and Tenth Circuits.

The Third Circuit held, as a "threshold" matter, that "for-profit, secular corporations [and their family owners] cannot engage in religious exercise" protected by the Free Exercise Clause or RFRA. Pet. App. at 10a. In so holding, the Third Circuit expressly acknowledged that its holding conflicted with decisions of the Ninth and Tenth Circuits.[3] *Id.* at 19a n.7, 25a.

1. Conflict with the Tenth Circuit.

The Tenth Circuit's decision in *Hobby Lobby* is squarely against the decision below. In that case, two closely held, for-profit corporations and the family that founded, owned, and operated them challenged the very same contraceptive-coverage Mandate under RFRA and the Free Exercise Clause.

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[3] The Third Circuit's holding also squarely conflicts with unpublished decisions of the Seventh and Eighth Circuits that grant injunctions pending appeal barring enforcement of the Mandate against for-profit businesses and their individual owners. *See, e.g.*, *Annex Medical, Inc. v. Sebelius*, No. 13–1118, 2013 WL 1276025, at *3 (8th Cir. Feb. 1, 2013); *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *5 (7th Cir. 2012 Dec. 28, 2012).

723 F.3d at 1120. The plaintiffs there had a similar objection to covering contraceptives that may prevent the implantation of a human embryo in the womb. *Id.* at 1124–25.

Sitting en banc, the Tenth Circuit ruled for the plaintiffs under both the First Amendment and RFRA. On RFRA, it "h[e]ld as a matter of statutory interpretation that Congress did not exclude for-profit corporations from RFRA's protections. Such corporations may be 'persons' exercising religion for purposes of the statute." *Id.* at 1129. The Dictionary Act provides that a statutory definition of "person" ordinarily includes corporations and the like, and nothing in RFRA, other statutes, or case law indicates otherwise. *Id.* at 1129–32 (citing 1 U.S.C. § 1).

On the First Amendment, the Tenth Circuit held that, "as a matter of constitutional law, Free Exercise rights may extend to some for-profit organizations." *Id.* at 1129. It noted that this Court has allowed corporations, as well as the individual proprietors of for-profit businesses, to claim free exercise rights. *Id.* at 1133–34. The line between for-profit and non-profit businesses is unwarranted and untenable, it reasoned. *Id.* at 1135–36. Thus, the Tenth Circuit held that the corporate plaintiffs exercised religion within the meaning of RFRA and the Free Exercise Clause and had proven a substantial burden on their exercise of religion due to the Mandate's commands and penalties requiring them to violate their religious principles. *Id.* at 1137–43. It also held that the Mandate's many exemptions undercut the government's claimed

compelling interest and that the government had not shown that it had chosen the least restrictive means. *Id.* at 1143–44.

Accordingly, the Tenth Circuit insisted that "the Free Exercise Clause is not a 'purely personal' guarantee[] ... unavailable to corporations." *Id.* at 1133 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978)). In reaching the opposite conclusion in this case, the Third Circuit analyzed the very same question, *i.e.*, whether "the Free Exercise Clause has historically protected corporations, or whether the guarantee is 'purely personal' or is unavailable to corporations based on the 'nature, history, and purpose of [this] particular constitutional provision.'" Pet. App. at 17a (quoting *Bellotti*, 435 U.S. at 778 n.14).

The Tenth Circuit's en banc ruling on the same contraceptive-coverage Mandate contested here is directly on point. The decision below explicitly acknowledged the Tenth Circuit's holding and its import, but "respectfully disagree[d] with that Court's analysis" and declined to follow it. *Id.* at 19a n.7.

2. Conflict with the Ninth Circuit.

The Ninth Circuit has likewise allowed for-profit corporations to raise free exercise claims, in effect letting the family owners' rights and the substantial burden on their religious exercise pass through the corporation. In *Townley*, a closely-held manufacturer of mining equipment required its employees to attend weekly devotional services. 859 F.2d at 611–

12. The Townleys, who founded the business and owned 94% of the stock, claimed the Free Exercise Clause exempted them from Title VII's ban on religious discrimination. *Id.* at 611, 619.

The Ninth Circuit treated the corporation "Townley [as] merely the instrument by which Mr. and Mrs. Townley express their religious beliefs." *Id.* at 619. Because "Townley present[ed] no rights of its own different from or greater than its owners' rights," the court held that "the rights at issue are those of Jake and Helen Townley." *Id.* at 620. Because the command on Townley to cease requiring devotional services would "make it more difficult" for the Townley family "to impart their religious message," the court found a constitutionally sufficient "adverse[] impact" on the Townleys' religious exercise. *Id.* at 621. Having satisfied this preliminary showing, the Ninth Circuit proceeded to the strict scrutiny test, examining "[t]he strength of the government's interest" and the "least restrictive means" doctrine. On those grounds, the court upheld Title VII's application to Townley. *Id.*

The Ninth Circuit reiterated this pass-through doctrine in *Stormans*. In that case, a pharmacy sought a preliminary injunction against a free exercise challenge to a state requirement that it stock Plan B, one of the contraceptives at issue here. 586 F.3d at 1117. The Ninth Circuit stressed that the pharmacy was a "fourth-generation, family-owned business whose shareholders and directors are made up entirely of members of the Stormans family." *Id.* at 1120. The pharmacy was "an extension of the beliefs of members of the Stormans

family, and ... the beliefs of the Stormans family are the beliefs of the pharmacy." *Id.* The Ninth Circuit again "h[e]ld that, as in *Townley*, Stormans has standing to assert the free exercise rights of its owners." *Id.* The Ninth Circuit then proceeded to the scrutiny analysis applicable under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and held that the law was neutral and generally applicable on the facts at bar and that the rational basis test therefore applied. 586 F.3d at 1128–38.

The decision below recited the holdings and reasoning of both cases and in no way distinguished them. Pet. App. at 23a–27a. Rather, the Third Circuit twice noted its direct divergence from the Ninth Circuit. On the question of whether a family's religious exercise "passes through" to let a corporation bring religious exercise claims because the corporation's religious activities are essentially the family's, the panel below declared that, "[a]fter carefully considering the Ninth Circuit's reasoning, we are not persuaded" and "decline to adopt the *Townley/Stormans* theory." *Id.* at 25a. On the mirror-image issue of whether the government's commands against a family corporation "pass through" to substantially burden its family owners and operators, the court rejected that argument "[f]or the same reasons that we concluded that the Hahns' claims cannot 'pass through' Conestoga." *Id.* at 28a. Thus the court held "that the Hahns do not have viable claims" because "[t]he Mandate does not impose any requirements on the Hahns" directly. *Id.*

B. As the Dissent Noted, the Decision Below Is Also at Odds with Decisions of the Second Circuit and Minnesota Supreme Court.

The Third Circuit's holding, as Judge Jordan observed in dissent, is also irreconcilable with decisions of the Second Circuit and Minnesota Supreme Court. Pet. App. at 68a n.21.

For instance, the Second Circuit recently allowed a kosher deli and butcher shop and its owners to raise free exercise challenges to kosher-food labeling laws. *Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 200–01 (2d Cir. 2012). Similar to the Ninth Circuit's holdings in *Townley* and *Stormans*, the Second Circuit declared that "[at] a minimum," the "protections of the Free Exercise Clause pertain" to religious claims by owners of a business corporation. *Id.* (quoting *Lukumi*, 508 U.S. at 532).

The Minnesota Supreme Court has likewise held that a sports and health club had standing to raise its owners' free exercise rights as a defense to a state-law discrimination charge. In rejecting the contrary position favored by the Third Circuit, it noted that the "conclusory assertion that a corporation has no constitutional right to free exercise of religion is unsupported by any cited authority." *McClure v. Sports & Health Club*, 370 N.W.2d 844, 850–51 (Minn. 1985).

Both the Second Circuit and the Minnesota Supreme Court proceeded to the applicable scrutiny

test. *Commack* upheld the state law as neutral, generally applicable, and supported by a rational basis, 680 F.3d at 210, and *McClure* held that the government satisfied the compelling interest and least restrictive means tests, 370 N.W.2d at 852–53. Neither decision can be reconciled with the Third Circuit's determination that a corporation and its family owners cannot exercise religion and do not face a burden on that exercise when the government commands them to violate their beliefs.

C. A Recent Sixth Circuit Decision Deepens the Existing Circuit Conflict.

Relying substantially on the same logic employed by the Third Circuit in this case, a Sixth Circuit panel recently held that the family owners of a closely-held business in Michigan lacked standing to challenge the Mandate in their personal capacities. *Autocam Corp.*, 2013 WL 5182544, at *4–5. The Sixth Circuit viewed the family owners' religious dilemma as an injury that could not "fairly be classified as a harm distinct from" that of their business. *Id.* at *5. And it rejected the Ninth Circuit's "'pass through' theory" as an "abandon[ment] [of] corporate law doctrine at the point it matters most." *Id.* Because the Mandate's burden fell directly on the closely-held business, not its owners, the Sixth Circuit concluded not only that the family members lacked standing to "bring claims in their individual capacities under RFRA," but also that the business was unable to "assert ... claims on their behalf." *Id.* It consequently remanded for the district court to dismiss the plaintiffs' individual free exercise claims en masse. *Id.*

The Sixth Circuit also agreed with the Third Circuit's conclusion below that a closely-held business "is not a 'person' capable of 'religious exercise' as intended by RFRA." *Id.* at *7. Although the court recognized that "many religious groups organized under the corporate form have made successful Free Exercise Clause or RFRA claims," it excepted from this rule corporations that are "primarily organized for secular, profit-seeking purposes." *Id.* at *8. The panel based this distinction primarily on the fact that RFRA's legislative history made "no mention of for-profit corporations," *id.* at *9, after it severely cabined the scope of the Dictionary Act, *id.* at *7.

The Sixth Circuit thus held as a threshold matter that neither family owners nor their closely-held business have free exercise rights that may shield them from the Mandate. In so doing, it explicitly disagreed with prior holdings of the Ninth and Tenth Circuits, *id.* at *5, *7, adopted much of the Third Circuit's reasoning here, *id.* at *5, *7-9, deepened the existing circuit conflict, and clarified the need for this Court's review.

II. Proprietors and Their Businesses Do Not Forfeit Their Free Exercise Rights Simply Because They Act for Profit Through the Corporate Form.

A. Corporations Can Exercise Religion.

The Third Circuit's rejection of free exercise rights conflicts with this Court's precedents as well.

In places, the panel majority suggested that only natural persons, not corporations, may ever bring free exercise claims. Indeed, the court framed the question as whether, "because the historic function of the particular guarantee has been limited to the protection of individuals, Pet. App. at 16a (quotation omitted), "the Free Exercise Clause ... guarantee is purely personal [and so] unavailable to corporations," *id.* at 17a (quotation omitted). It thus treated religious liberty as a purely individual right that corporations, as intangible creatures of law, cannot exercise. *Id.* at 19a–21a.

That logic is unsound. RFRA's statutory structure declares that a "person" who can exercise religion explicitly "include[s] corporations" unless the context indicates otherwise. 1 U.S.C. § 1. And the context of the First Amendment and its Free Exercise Clause does not exclude corporations. Indeed, "[a]n individual's freedom to speak, *to worship*, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (emphasis added). Therefore, courts have "recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and *the exercise of religion.* The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties." *Id.* at 618 (emphasis added).

As noted by the dissent below, this Court has repeatedly allowed corporations to bring free exercise claims. Pet. App. at 50a–52a (citing *Lukumi*, 508 U.S. at 525–26; *Amos*, 483 U.S. at 330; *Bob Jones Univ.*, 461 U.S. at 604 n.29; *see also Ashcroft*, 389 F.3d at 973 (a "New Mexico corporation"), *aff'd by Gonzales*, 546 U.S. 418; *Hosanna-Tabor*, 597 F.3d at 772 (an "ecclesiastical corporation"), *rev'd by Hosanna-Tabor*, 132 S. Ct. 694. Each of the corporations in those cases was equally intangible and equally a creature of law.

The Third Circuit's reasoning further conflicts with this Court's instruction in *Bellotti* as to how a court should determine whether a First Amendment right is at stake. In *Bellotti*, the "court below framed the principal question ... as whether and to what extent corporations have First Amendment rights." 435 U.S. at 775–76. But this Court determined that it had "posed the wrong question." *Id.* at 776. "The proper question ... [was] not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons." *Id.* "Instead, the question must be whether [the law] abridges [a right] that the First Amendment was meant to protect." *Id.* Accordingly, this Court later recognized that when proprietors religiously object to a government requirement on their businesses, they are exercising religion. *United States v. Lee*, 455 U.S. 252, 257 (1982). The same must be true for business corporations.

The Third Circuit's holding that religious exercise is "purely personal" is contrary to this Court's precedent and calls into question the Free

Exercise Clause and RFRA rights of non-profit corporations, including churches.

B. Religion Can Be Exercised While Pursuing Profit.

Due to the longstanding recognition of corporate religious exercise in the non-profit context, the panel majority fell back upon an attempted distinction between for-profit and non-profit activity. But that line fails as well. This Court has allowed an Amish business owner to raise a free exercise defense to nonpayment of Social Security taxes. *Lee*, 455 U.S. at 254, 257. It has also let Jewish merchants challenge Sunday-closing laws on the same ground. *Braunfeld*, 366 U.S. at 601; *id.* at 610 (Brennan, J., concurring in relevant part and dissenting on other grounds); *id.* at 616 (Stewart, J., dissenting on other grounds). These rulings were indisputably correct as neither RFRA nor the Free Exercise Clause contains an exception for activity carried out for profit. On the contrary, "religious exercise" under RFRA includes "any exercise of religion." 42 U.S.C. § 2000cc–5(7) (incorporated into RFRA by 42 U.S.C. § 2000bb–2(4)).

The Third Circuit's denial of religious exercise to corporations because they are for-profit also conflicts with basic principles of corporate law. The Commonwealth of Pennsylvania, where Conestoga is incorporated, adopts the standard view that a business corporation can pursue all lawful purposes, including those that are religious in nature. 15 PA. CONS. STAT. § 1501 (granting business corporations "the legal capacity of natural persons to act"). Further, Judge Jordan's dissent acknowledged that

the Third Circuit's reasoning incorporates the tax code's definition of "for-profit" versus "non-profit" entities, thus subjecting free exercise rights enshrined in the First Amendment to the vagaries of the Internal Revenue Code.[4] Pet. App. at 31a. This fatal flaw caused the Tenth Circuit to expressly reject the Third Circuit's logic. Adopting a for-profit line against religion, the Tenth Circuit noted, would open a can of worms: "What if Congress eliminates the for-profit/non-profit distinction in tax law? .... Or consider a church that, for whatever reason, loses its 501(c)(3) status. Does it thereby lose Free Exercise Rights?" *Hobby Lobby*, 723 F.3d at 1135.

The Third Circuit majority erred in assuming that one cannot simultaneously make money and do so in a religiously observant way. The Free Exercise Clause is not confined to the Sabbath or Sunday morning church services; it extends throughout the week. Surely kosher butchers could challenge a state's kosher-labeling law if it interfered with the free exercise of the proprietors' Jewish faith, regardless of their businesses' corporate status. *See*

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[4] As Judge Kleinfeld explained in his concurrence in *Spencer v. World Vision*, 619 F.3d 1109, 1130–31 (9th Cir. 2010),

> There is not much congruence between nonprofit status and the free exercise of religion, or any eleemosynary purpose.... Nonprofit status affects corporate governance, not eleemosynary activities. We lawyers organize corporations as nonprofits when a tax exemption is sought, or so that board members can pick their successors and avoid the need to repurchase stock from surviving spouses after the deaths of the principals. 'For profit' and 'nonprofit' have nothing to do with making money.

Commack, 680 F.3d at 200–01. As the Tenth Circuit observed, "sincerely religious persons could find a connection between the exercise of religion and the pursuit of profit.... A religious individual may enter the for-profit realm intending to demonstrate to the marketplace that a corporation can succeed financially while adhering to religious values." *Hobby Lobby*, 723 F.3d at 1135.

C. Corporations Exercise First Amendment Rights Generally.

The Third Circuit's opinion also conflicts with this Court's cases allowing corporations to exercise other First Amendment freedoms. The freedoms of speech and of the press have long protected for-profit newspapers and other publishers. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). More recently, in *Citizens United*, this Court squarely reaffirmed that "First Amendment protection extends to corporations," 558 U.S. at 342, "*both for-profit and nonprofit*," *id.* at 354 (emphasis added). *See also Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 687 (1978) ("[C]orporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis."); *cf. United States v. Amedy*, 24 U.S. 392, 412 (1826) ("That corporations are, in law, for civil purposes, deemed persons, is unquestionable."). The decision below is at odds with these important areas of First Amendment law.

D. Burdens on a Family Business Substantially Impact the Family's Activities in the Business.

Burdens placed upon corporations affect their proprietors, too, especially when the corporations are closely held. Even an "indirect consequence" of a law can amount to a "substantial burden" upon religious free exercise. *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717 (1981). Here, the contraceptive-coverage Mandate places "substantial pressure on [the Hahns] to modify [their] behavior and to violate [their] beliefs." *Id.* at 718. That impairs the Hahns' free exercise rights.

In denying the Mandate's impact on the Hahns, the court below failed to heed this Court's instruction that the government need not directly "*compel* a violation of conscience" to burden religious exercise. *Thomas*, 450 U.S. at 717. The Third Circuit's rationale is parallel to the arguments rejected in *Thomas* and *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). In both of those cases, plaintiffs refrained from gainful employment due to their religious objections to job conditions: one did not want to work on the Sabbath, the other in a tank factory. *Sherbert*, 374 U.S. at 399; *Thomas*, 450 U.S. at 709–11. They were not commanded to work under such conditions, but merely faced the denial of unemployment benefits for refraining from doing so.

As this Court explained, "no criminal sanctions directly compel appellant to work a six-day week," *Sherbert*, 374 U.S. at 403, thus the law did "not *compel* a violation of conscience," *Thomas*, 450 U.S.

at 717. Nonetheless, this Court ruled that a substantial burden was imposed on the plaintiffs because the law pressured them to choose between their beliefs and the receipt of benefits. *Sherbert*, 374 U.S. at 404 (holding that despite the lack of direct sanctions, "the pressure upon [Sherbert] to forego that [religious] practice is unmistakable"); *Thomas*, 450 U.S. at 717–18 (holding that despite no direct command to violate conscience, "the employee was put to a choice between fidelity to religious belief or cessation of work; the coercive impact on Thomas is indistinguishable from *Sherbert*").

Here, the Third Circuit echoed the same indirectness rationale rejected in *Sherbert* and *Thomas*, that "[s]ince Conestoga is distinct from the Hahns, the Mandate does not actually require the Hahns to do anything." Pet. App. at 26a. But in *Thomas*, when "the employee was put to a choice between fidelity to religious belief or cessation of work[,] the coercive impact" constituted a substantial burden. 450 U.S. at 717. Likewise the Hahns are faced with the "choice" of (a) operating their business in violation of their religious beliefs, (b) subjecting it to the government's ruinous penalties, or (c) departing the world of business altogether. This constitutes "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 718. Yet, the Third Circuit declared that "the Hahns do not have viable claims" due to the Mandate's impact falling on Conestoga. Pet. App. at 28a. But telling religious families that they must violate their beliefs or vacate the business world does not undermine the existence

of a substantial burden on Petitioners' religious exercise; it proves it.

The Third Circuit reasoned that because corporations are distinct legal entities, their proprietors' rights cannot pass through them or be exercised by them. *Id.* at 25a–27a. It concluded that owners may not use corporations to limit their legal and financial liability without treating the companies themselves as distinct for all purposes. *Id.* at 25a–26a. But this view is problematic on two levels. First, legal liability and religious liability are not coextensive. Business owners may be religiously burdened by a government requirement that compels them to run their corporations in unconscionable ways, regardless of whether they incur personal legal liability for rejecting those actions. Limits on legal liability do not restrict the bounds of conscience or the reach of religious free exercise.

Second, corporations are treated as distinct entities for some purposes but not others all the time. The Internal Revenue Code, for instance, allows corporations with no more than one hundred shareholders to elect S-corporation status, in which income is not taxable at the corporate level but passes directly through to the shareholders. *See* 26 U.S.C. §§ 1361–63. Conestoga Wood is just such an S corporation, as it qualifies for that election as a closely held business owned by a small group of family shareholders. Pet. App. at 2h–4h. As a result, on their individual income tax returns, the Hahns report Conestoga Wood's income as their own. *Id.* at 3h. Given the relevant importance of the interests at stake, it makes little sense to allow taxable income

and deductions to pass through the corporate form to business owners, while denying the same treatment to the free exercise of religion, a fundamental right guaranteed by the First Amendment and RFRA.

III. The Question Presented Is Extremely Important, Especially in the Context of the Affordable Care Act's Contraceptive-Coverage Mandate.

The question presented is exceptionally important. Our nation was founded on freedom of religion, and our free-enterprise system allows entrepreneurs to pursue profit while also serving the common good. But the decision below puts these two foundational principles at odds. Must religious believers check their consciences at the door of their businesses, or may they generally live integrated lives of faith at work?

The question is particularly important in the context of the ACA, one of the most sweeping and intrusive federal laws ever enacted. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2649 (2012) (joint dissent) (noting the threat the individual mandate posed to "our constitutional order" by subjecting "*all* private conduct (including failure to act) ... to federal control, effectively destroying the Constitution's division of governmental powers"). On the one hand, the government asserts an interest in uniform enforcement across the country, while it engages in broad discretionary and situational enforcement. On the other hand, challengers assert profound interests in freedom from government intrusion, protected

both by the First Amendment and vindicated by Congress in RFRA. Thus, in petitioning for certiorari two years ago, the Solicitor General noted that the enforceability of the ACA "involves a question of fundamental importance." *Dep't of Health & Human Servs. v. Florida*, Pet. for a Writ of Cert. at 29, (No. 11–398) (Sept. 2011). That is as true of the contraceptive-coverage Mandate at issue here as it was of the individual-coverage mandate at issue there.

Conflicting applications of the same federal law matter greatly in the economic realm, where different businesses face different rules and may maneuver to avoid them. Under the decision below, proprietors and corporations based in the Third Circuit are denied the free exercise protections enjoyed by those in several other circuits. Many proprietors, large and small, choose to incorporate in Delaware, one of the leading markets for corporate law. But the circuit conflict encourages forum-shopping and may serve to distort the market for incorporation. Devout entrepreneurs will undoubtedly consider relocating their businesses to the Tenth Circuit to protect their freedom of conscience and their right to freely exercise religion.

The prospect of disparate results across the nation is especially stark because it is currently unclear whether the application of the contraceptive-coverage Mandate will depend on the location where a business' insurance plan is sponsored, or on the location where its business activities occur. *See* 42 U.S.C. § 300gg–13(a) (applying preventive services mandates to the "plan"). Having won in the Tenth

Circuit, Hobby Lobby's Pennsylvania stores may be exempt from the contraceptive-coverage Mandate because its health insurance plan is based in Oklahoma, while Conestoga's operations in Pennsylvania are subject to the same Mandate.

Fundamentally, the Mandate raises several important concerns over the power of the ACA to trump even the most fundamental of rights. As Judge Jordan recognized, the government's assertion of broadly formulated health interests is in obvious tension with its decision to "exempt[] an enormous number of employers from the Mandate, including 'religious employers' who appear to share the same religious objection as Conestoga and the Hahns, leaving tens of millions of employees and their families untouched by it." Pet. App. at 82a. This, along with the other exemptions and discretionary applications of the ACA, undermines any purported compelling interest because it "leaves appreciable damage to [the government's] supposedly vital interest unprohibited." *Id.* at 83a (quoting *Lukumi*, 508 U.S. at 547).

The exclusions and discretionary treatment of religion in implementing the ACA further suggest the Mandate is not "generally applicable" or "neutral" within the meaning of *Smith*, 494 U.S. at 880. Judge Jordan cogently explained that the Mandate lacks general applicability because "the government has provided numerous exemptions, large categories of which are unrelated to religious objections, namely, the exemption for grandfathered plans and the exemption for employers with less than 50 employees." Pet. App. at 88a; *see also*

Blackhawk v. Pennsylvania, 381 F.3d 202, 211 (3d Cir. 2004) (Alito, J.) (recognizing that a law is not generally applicable if it "burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated"). "And it seems less than neutral to say that some religiously motivated employers—the ones picked by the government—are exempt while others are not." *Id.*; *see also Fraternal Order of Police v. City of* Newark, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.) (noting that a regulation lacks neutrality if it "creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection").

The government's evidence supporting the Mandate is also "research [] based on correlation," not "evidence of causation" that the contraceptive-coverage Mandate is needed to prevent actual problems. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2739 (2011). And, as Judge Jordan noted, the government is readily able to pursue its alleged interests through less restrictive means, such as by the expanded use of programs it already has in place to provide free family planning. *See* Pet. App. at 87a ("[T]he government already provides free contraception to some women, and there has been no showing that increasing the distribution of it would not achieve the government's goals."); *cf. Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 799–800 (1988) (recognizing less restrictive means that may be indirect and involve government expense).

Finally, the Mandate is already in effect, imposing fines and lawsuits on plans that offer employee coverage but omit required items. 77 Fed. Reg. at 8725 (finalizing the Mandate on for-profit companies); 26 U.S.C. § 4980D ($100/plan participant/day fines); 29 U.S.C. § 1132 (government lawsuits). More than thirty other pending cases nationwide raise challenges to this Mandate under the same religious exercise claims that Petitioners press here. Pet. App. at 1l–4l. And Conestoga itself is presently coerced to provide these items or else devastate its employees by dropping their families' insurance coverage altogether, thereby subjecting its employee relations to turmoil. Family business owners and their small businesses urgently need this Court's guidance this Term, to know what insurance coverage they must provide and whether they will be forced out of business or sacrifice their beliefs.

IV. This Case is a Clean Vehicle.

This case presents an ideal vehicle for resolving the question presented. The relevant facts have never been disputed by either side, and no judge below suggested any deficiencies in the record. Indeed, in this and other cases on the same issue, the government has consistently maintained that discovery is unnecessary; it has been content to rest upon the administrative record of the contraceptive-Mandate regulations.[5] All the elements of the Free

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[5] *See, e.g., Geneva Coll. v. Sebelius*, No. 2:12–cv–00207–JFC Doc. # 82 (W.D. Pa. filed Apr. 12, 2013), Joint Proposed Discovery Plan at 5 [excerpted in Pet. App. at 1j–8j] (in a Pennsylvania case involving both a for-profit family business

Exercise Clause and RFRA claims were thoroughly briefed and argued below. The court of appeals' decision below definitively resolved all claims against Petitioners and left nothing to be determined on remand. Though the Third Circuit affirmed the denial of a preliminary injunction, its legal ruling on the merits forecloses Petitioners' pursuit of their free exercise claims as a matter of law.

Petitioners are also the ideal parties to bring this suit. They comprise both a Mennonite family of business owners and their closely held woodworking corporation, which is run by the family in accordance with their religious principles. Thus, this Court could rest its holding on corporations' own free exercise rights, proprietors' free exercise rights passed through the corporate form, or proprietors' individual right to free exercise. The decision below expressly reached and ruled against Petitioners on all three grounds.

Moreover, the five family member Petitioners wholly own the corporation's voting shares and actively manage the enterprise themselves. Pet. App. at 2h–4h. It is undisputed that the Hahns' faith "requires them to integrate the gifts of the spiritual

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and a non-profit college, "[t]he parties believe that there are no subjects on which fact discovery may be needed."); *Tyndale House Publishers v. Sebelius*, No. 1:12–cv–01635–RBW Doc. # 42-1 (D.D.C. filed June 17, 2013), Gov't's Statement of Facts in Support of Cross Mot. for Summary Judgment at 1-8 [reprinted in Pet. App. at 1k–13k] (seeking summary judgment after no discovery was conducted, and referencing the same sources cited during the preliminary injunction proceedings, including the administrative record, the 2011 IOM report, the Code of Federal Regulations, and legislative history).

life, [including] the virtues, morals, and ethical and social principles of Mennonite teaching into their life and work." *Id.* at 10g. That faith inspires Conestoga and the Hahns to "make substantial contributions to a variety of charitable and community organizations every year," thus demonstrating that business can be concerned with more than profit. *Id.* at 11g. In short, the Hahn family and their close identification with Conestoga exemplify the case for allowing for-profit businesses and their family owners to live their faith as they participate in the marketplace. If anyone subject to the contraceptive-coverage Mandate can claim free exercise rights, they can.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13-1144

CONESTOGA WOOD SPECIALTIES CORPORATION; NORMAN HAHN; NORMAN LEMAR HAHN; ANTHONY H. HAHN; ELIZABETH HAHN; KEVIN HAHN,

Appellants

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY UNITED STATES DEPARTMENT OF LABOR; SECRETARY UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 5-12-cv-06744)
District Judge: Honorable Mitchell S. Goldberg

Argued May 30, 2013

BEFORE: JORDAN, VANASKIE and COWEN,
Circuit Judges

(Filed: July 26, 2013)

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OPINION

COWEN, Circuit Judge.

Appellants Conestoga Wood Specialties Corporation ("Conestoga"), Norman Hahn, Elizabeth Hahn, Norman Lemar Hahn, Anthony Hahn, and Kevin Hahn (collectively, "the Hahns") appeal from an order of the District Court denying their motion for a preliminary injunction. In their Complaint, Appellants allege that regulations promulgated by the Department of Health and Human Services ("HHS"), which require group health plans and health insurance issuers to provide coverage for contraceptives, violate the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb ("RFRA") and the Free Exercise Clause of the First Amendment of the United States Constitution.[1] The District Court denied a preliminary injunction, concluding that Appellants were unlikely to succeed on the merits of their claims. *See Conestoga Wood Specialties Corp. v.*

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[1] The Complaint also alleges that the regulations violate the Establishment Clause, the Free Speech Clause, the Due Process Clause, and the Administrative Procedure Act. While the District Court's opinion addressed some of these additional claims, Appellants have limited their appeal to whether the regulations violate the RFRA and the Free Exercise Clause.

Sebelius, No. 12-CV-6744, 2013 WL 140110 (E.D. Pa. Jan. 11, 2013). Appellants then filed an expedited motion for a stay pending appeal with this Court, which was denied. *See Conestoga Wood Specialties Corp. v. Sec'y of the United States Dep't of Health & Human Servs.*, No. 13-1144, 2013 WL 1277419 (3d Cir. Feb. 8, 2013). Now, we consider the fully briefed appeal from the District Court's denial of a preliminary injunction.

Before we can even reach the merits of the First Amendment and RFRA claims, we must consider a threshold issue: whether a for-profit, secular corporation is able to engage in religious exercise under the Free Exercise Clause of the First Amendment and the RFRA. As we conclude that for profit, secular corporations cannot engage in religious exercise, we will affirm the order of the District Court.

I.

In 2010, Congress passed the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (March 23, 2010) ("ACA"). The ACA requires employers with fifty or more employees to provide their employees with a minimum level of health insurance. The ACA requires non-exempt group plans to provide coverage without cost-sharing for preventative care and screening for women in accordance with guidelines created by the Health Resources and Services Administration ("HRSA"), a subagency of HHS. *See* 42 U.S.C. § 300gg-13(a)(4).

The HRSA delegated the creation of guidelines on this issue to the Institute of Medicine ("IOM"). The IOM recommended that the HRSA adopt guidelines that require non-exempt group plans to cover "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity."[2] These recommended guidelines were approved by the HRSA. On February 15, 2012, HHS, the Department of the Treasury, and the Department of Labor published final rules memorializing the guidelines. *See* 77 Fed. Reg. 8725 (Feb. 15, 2012). [3] Under the regulations, group health plans and health insurance issuers are required to provide coverage consistent with the HRSA guidelines in plan years beginning on or after August 1, 2012, unless the employer or the plan is exempt.[4] Appellants refer to this requirement as the "Mandate," and we use this term throughout this opinion. Employers who fail to comply with the Mandate face a penalty of $100 per day per offending employee. *See* 26 U.S.C. § 4980D. The Department of

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[2] *See* Women's Preventive Services: Required Health Plan Coverage Guidelines, *available at* www.hrsa.gov/womens guidelines (last visited July 25, 2013).

[3] These regulations were updated on July 2, 2013. *See* 78 Fed. Reg. 39870 (July 2, 2013). The recent changes have no impact on this litigation.

[4] The exemptions encompass "grandfathered" plans, which are plans that were in existence on March 23, 2010, *see* 45 C.F.R. § 147.140 and "religious employers," *see* 45 C.F.R. § 147.130(a)(1)(iv)(B). Additionally, the ACA requirement to provide employer sponsored health insurance to employees is entirely inapplicable to employers that have fewer than 50 employees. *See* 26 U.S.C. § 4980H(a), (c)(2)(A).

Labor and plan participants may also bring a suit against an employer that fails to comply with the Mandate. *See* 29 U.S.C. § 1132.

II.

The Hahns own 100 percent of the voting shares of Conestoga. Conestoga is a Pennsylvania for-profit corporation that manufactures wood cabinets and has 950 employees. The Hahns practice the Mennonite religion. According to their Amended Complaint, the Mennonite Church "teaches that taking of life which includes anything that terminates a fertilized embryo is intrinsic evil and a sin against God to which they are held accountable." (Am. Compl. ¶ 30.)[5] Specifically, the Hahns object to two drugs that must be provided by group health plans under the Mandate that "may cause the demise of an already conceived but not yet attached human embryo." (*Id.* at ¶ 45.) These are "emergency contraception" drugs such as Plan B (the "morning after pill") and *ella* (the "week after pill"). The Amended Complaint alleges that it is immoral and sinful for Appellants to intentionally participate in, pay for, facilitate, or otherwise support these drugs.

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[5] In addition, on October 31, 2012, Conestoga's Board of Directors adopted "The Hahn Family Statement on the Sanctity of Human Life," which provides, amongst other things, that "The Hahn Family believes that human life begins at conception (at the point where an egg and sperm unite) and that it is a sacred gift from God and only God has the right to terminate human life. Therefore, it is against our moral conviction to be involved in the termination of human life through abortion, suicide, euthanasia, murder, or any other acts that involve the taking of human life." (*Id.* at ¶ 92.)

(*Id.* at ¶ 32.) Conestoga has been subject to the Mandate as of January 1, 2013, when its group health plan came up for renewal. As a panel of this Court previously denied an injunction pending appeal, Conestoga is currently subject to the Mandate, and in fact, Appellants' counsel represented during oral argument that Conestoga is currently complying with the Mandate.

III.

We review a district court's denial of a preliminary injunction for abuse of discretion, but review the underlying factual findings for clear error and questions of law de novo. *Am. Express Travel Related Servs. v. Sidamon-Eristoff*, 669 F.3d 359, 366 (3d Cir. 2012). The District Court had jurisdiction over this case under 28 U.S.C. § 1331. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

"A party seeking a preliminary injunction must show: (1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Kos Pharms, Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). A plaintiff seeking an injunction must meet all four criteria, as "[a] plaintiff's failure to establish any element in its favor renders a preliminary injunction inappropriate." *NutraSweet Co. v. Vit-Mar Enters., Inc.*, 176 F.3d 151, 153 (3d Cir. 1999). This is the

same standard applied in the District Court, and, on appeal, no party has questioned its accuracy.[6] We will first consider whether Appellants are likely to succeed on the merits of their claim, beginning with the claims asserted by Conestoga, a for-profit, secular corporation.

IV.

A.

First, we turn to Conestoga's claims under the First Amendment. Under the First Amendment, "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof." The threshold question for this Court is whether Conestoga, a for-profit, secular corporation, can exercise religion. In essence, Appellants offer two theories under which we could conclude that Conestoga can exercise religion: (a) directly, under the Supreme Court's recent decision in *Citizens United*, and (b) indirectly, under the "passed through" method that has been articulated by the Court of Appeals for the Ninth Circuit. We will discuss each theory in turn.

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[6] The dissent has undertaken a scholarly survey of the proper standard for obtaining a preliminary injunction throughout the country. However, Appellants never took an appeal of the preliminary injunction standard applied by the District Court. (*See* Appellants' Br. at 4-6 (statement of issues presented for review).) Moreover, the dissent acknowledges that it "may be true" that the plaintiff's failure to satisfy any element in its favor renders a preliminary injunction inappropriate. (Dissenting Op. at 9.)

In *Citizens United*, the Supreme Court held that "the Government may not suppress political speech on the basis of the speaker's corporate identity," and it accordingly struck down statutory restrictions on corporate independent expenditure. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010). *Citizens United* recognizes the application of the First Amendment to corporations generally without distinguishing between the Free Exercise Clause and the Free Speech Clause, both which are contained within the First Amendment. Accordingly, whether *Citizens United* is applicable to the Free Exercise Clause is a question of first impression. *See Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641, 643 (2012) (Sotomayor, Circuit Justice) ("This court has not previously addressed similar RFRA or free exercise claims brought by closely held for-profit corporations and their controlling shareholders ... .").

While "a corporation is 'an artificial being, invisible, intangible, and existing only in contemplation of law,' ... a wide variety of constitutional rights may be asserted by corporations." *Consol. Edison Co. of N.Y., Inc. v. Pataki*, 292 F.3d 338, 347 (2d Cir. 2002) (quoting *Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) (Marshall, C.J.)) In analyzing whether constitutional guarantees apply to corporations, the Supreme Court has held that certain guarantees are held by corporations and that certain guarantees are "purely personal" because "the 'historic function' of the particular guarantee has been limited to the protection of individuals." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765,

778 n.14 (1978) (internal citation omitted). The *Bellotti* Court observed:

> Corporate identity has been determinative in several decisions denying corporations certain constitutional rights, such as the privilege against compulsory self-incrimination, *Wilson v. United States,* 221 U.S. 361, 382–386, 31 S. Ct. 538, 545–546, 55 L. Ed. 771 (1911), or equality with individuals in the enjoyment of a right to privacy, *California Bankers Assn. v. Shultz,* 416 U.S. 21, 65–67, 94 S. Ct. 1494, 1519–1520, 39 L. Ed. 2d 812 (1974); *United States v. Morton Salt Co.,* 338 U.S. 632, 651– 652, 70 S. Ct. 357, 368–369, 94 L. Ed. 401 (1950), but this is not because the States are free to define the rights of their creatures without constitutional limit. Otherwise, corporations could be denied the protection of all constitutional guarantees, including due process and the equal protection of the laws. Certain "purely personal" guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the "historic function" of the particular guarantee has been limited to the protection of individuals. *United States v. White,* 322 U.S. 694, 698–701, 64 S. Ct. 1248, 1251–1252, 88 L. Ed. 1542 (1944). Whether or not a particular guarantee is "purely personal" or is unavailable to corporations for some other reason depends on the nature, history,

> and purpose of the particular constitutional provision.

Id. Thus, we must consider whether the Free Exercise Clause has historically protected corporations, or whether the "guarantee is 'purely personal' or is unavailable to corporations" based on the "nature, history, and purpose of [this] particular constitutional provision." *Id.*

In *Citizens United*, the Supreme Court pointed out that it has "recognized that First Amendment protection extends to corporations." *Citizens United*, 558 U.S. at 342. It then cited to more than twenty cases, from as early as the 1950's, including landmark cases such as *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), in which the Court recognized that First Amendment free speech rights apply to corporations. *See id.* The *Citizens United* Court particularly relied on *Bellotti*, which struck down a state-law prohibition on corporate independent expenditures related to referenda issues. *Bellotti* held:

> We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property. [That proposition] amounts to an impermissible legislative

> prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify communication.

Bellotti, 435 U.S. at 784. Discussing *Bellotti's* rationale, *Citizens United* stated that the case "rested on the principle that the Government lacks the power to ban corporations from speaking." *Citizens United*, 558 U.S. at 347; *see also Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8 (1986) ("The identity of the speaker is not decisive in determining whether speech is protected" as "[c]orporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster.") (quoting *Bellotti*, 435 U.S. at 795).

Citizens United is thus grounded in the notion that the Court has a long history of protecting corporations' rights to free speech. *Citizens United* overruled *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), a case in which the Court had "uph[eld] a direct restriction on the independent expenditure of funds for political speech for the first time in [this Court's] history." *Citizens United*, 558 U.S. at 347 (quoting *Austin*, 494 U.S. at 695 (Kennedy, J., dissenting)). The *Citizens United* Court found that it was "confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker's corporate

identify and a post-*Austin* line that permits them." *Id.* at 348. Faced with this conflict, the Court decided that *Austin* was wrongly decided, based on the otherwise consistent line of cases in which corporations were found to have free speech rights.

We must consider the history of the Free Exercise Clause and determine whether there is a similar history of courts providing free exercise protection to corporations. We conclude that there is not. In fact, we are not aware of any case preceding the commencement of litigation about the Mandate, in which a for-profit, secular corporation was itself found to have free exercise rights.[7] Such a total absence of caselaw takes on even greater significance when compared to the extensive list of Supreme Court cases addressing the free speech rights of corporations.

After all, as the Supreme Court observed in *Schempp*, the purpose of the Free Exercise Clause "is to secure religious liberty *in the individual* by prohibiting any invasions thereof by civil authority." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963) (emphasis added). And as the District Court aptly noted in its opinion, "[r]eligious belief takes shape within the minds and hearts of

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[7] We acknowledge that the Court of Appeals for the Tenth Circuit, in an eight judge en banc panel, in six separate opinions, recently held that for-profit, secular corporations can assert RFRA and free exercise claims in some circumstances. *See Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2013 WL 3216103 (10th Cir. June 27, 2013). We respectfully disagree with that Court's analysis.

individuals, and its protection is one of the more uniquely 'human' rights provided by the Constitution." *Conestoga*, 2013 WL 140110, at *7. We do not see how a for-profit "artificial being, invisible, intangible, and existing only in contemplation of law," *Consol. Edison Co.*, 292 F.3d at 346 (quoting *Dartmouth Coll.*, 17 U.S. at 636 (Marshall, C.J.)), that was created to make money could exercise such an inherently "human" right.

We are unable to determine that the "nature, history, and purpose" of the Free Exercise Clause supports the conclusion that for-profit, secular corporations are protected under this particular constitutional provision. *See Bellotti*, 435 U.S. at 778 n.14. Even if we were to disregard the lack of historical recognition of the right, we simply cannot understand how a for-profit, secular corporation—apart from its owners—can exercise religion. As another court considering a challenge to the Mandate noted:

> General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors.

Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012), *rev'd en banc*, No. 12-6294, 2013 WL 3216103 (10th Cir. June 27, 2013);

see also Hobby Lobby Stores, Inc., 2013 WL 3216103, at *51 (Briscoe, C.J., concurring in part and dissenting in part) (questioning "whether a corporation can 'believe' at all, *see Citizens United*, 130 S.Ct. at 972 ('It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires.') (Stevens, J., concurring in part and dissenting in part).").

In urging us to hold that for-profit, secular corporations can exercise religion, Appellants, as well as the dissent, cite to cases in which courts have ruled in favor of free exercise claims advanced by religious organizations. *See, e.g.*, *Gonzalez v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993). None of the cases relied on by the dissent involve secular, for-profit corporations. We will not draw the conclusion that, just because courts have recognized the free exercise rights of churches and other religious entities, it necessarily follows that for-profit, secular corporations can exercise religion. As the Supreme Court recently noted, "the text of the First Amendment . . . gives special solicitude to the rights of religious organizations." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012). That churches—as means by which individuals practice religion—have long enjoyed the protections of the Free Exercise Clause is not determinative of the question of whether for-profit, secular corporations should be granted these same protections.

Appellants also argue that *Citizens United* is applicable to the Free Exercise Clause because "the authors of the First Amendment only separated the Free Exercise Clause and the Free Speech Clause by a semi-colon, thus showing the continuation of intent between the two." (Appellants' Br. at 34.) We are not persuaded that the use of a semi-colon means that each clause of the First Amendment must be interpreted jointly.

In fact, historically, each clause has been interpreted separately. Accordingly, the courts have developed different tests in an effort to apply these clauses. For example, while the various clauses of the First Amendment have been incorporated and made applicable to the states by the Due Process Clause of the Fourteenth Amendment, the Supreme Court did so at different times. Incorporation of the clauses of the First Amendment began with *Gitlow v. New York*, 268 U.S. 652, 666 (1925), where the Court noted that "we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." More than ten years later, in *De Jonge v. Oregon*, 299 U.S. 353 (1937), the Court incorporated the right of peaceable assembly. In doing so, the Court cited to *Gitlow*, and noted that "[t]he right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." *Id.* at 364. The language is important—even though the Free Speech Clause and the Petition Clause

appear next to one another in the First Amendment, the Court did not find that *Gitlow* had already decided that the Petition Clause was incorporated, but rather cited *Gitlow* as precedent to expand the incorporation doctrine to cover the Petition Clause.

Several years later, in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Supreme Court incorporated the Free Exercise Clause. The *Cantwell* Court did not cite to *Gitlow* as authority for incorporating the Free Exercise Clause; in other words, it did not automatically follow that the Free Exercise Clause was incorporated just because the Free Speech Clause was incorporated. Seven years after *Cantwell*, in *Everson v. Board of Education*, 330 U.S. 1 (1947), the Court incorporated the Establishment Clause. In *Everson*, the Court cited to *Cantwell* and noted that the Court's interpretation of the Free Exercise Clause should be applied to the Establishment Clause. *Id.* at 15. But notably, it took seven years for the Court to hold this; and following the same pattern, *Cantwell* did not automatically incorporate the Establishment Clause. Thus, it does not automatically follow that all clauses of the First Amendment must be interpreted identically.

Second, Appellants argue that Conestoga can exercise religion under a "passed through" theory, which was first developed by the Court of Appeals for the Ninth Circuit in *EEOC v. Townley Engineering & Manufacturing Company*, 859 F.2d 610 (9th Cir. 1988), and affirmed in *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009). In *Townley* and *Stormans*, the Ninth Circuit held that for-profit

corporations can assert the free exercise claims of their owners.

In *Townley*, the plaintiff was a closely-held manufacturing company whose owners made a "covenant with God requir[ing] them to share the Gospel with all of their employees." *Townley,* 859 F.2d at 620. Townley, the plaintiff corporation, sought an exemption, on free exercise grounds, from a provision of Title VII of the Civil Rights Act that required it to accommodate employees asserting religious objections to attending the company's mandatory devotional services. Although the plaintiff urged the "court to hold that it is entitled to invoke the Free Exercise Clause on its own behalf," the Ninth Circuit deemed it "unnecessary to address the abstract issue whether a for profit corporation has rights under the Free Exercise Clause independent of those of its shareholders and officers." *Id.* at 619-20. Rather, the court concluded that, "Townley is merely the instrument through and by which Mr. and Mrs. Townley express their religious beliefs." *Id.* at 619. As "Townley presents no rights of its own different from or greater than its owners' rights," the Ninth Circuit held that "the rights at issue are those of Jake and Helen Townley." *Id.* at 620. The court then examined the rights at issue as those of the corporation's owners, ultimately concluding that Title VII's requirement of religious accommodation did not violate the Townleys' free exercise rights. *Id.* at 621.

The Ninth Circuit subsequently applied *Townley*'s reasoning in *Stormans*. There, a pharmacy

brought a Free Exercise Clause challenge to a state regulation requiring it to dispense Plan B, an emergency contraceptive drug. *Stormans,* 586 F.3d at 1117. In analyzing whether the pharmacy had standing to assert the free exercise rights of its owners, the court emphasized that the pharmacy was a "fourth-generation, family-owned business whose shareholders and directors are made up entirely of members of the Stormans family." *Id.* at 1120. As in *Townley*, it "decline[d] to decide whether a for-profit corporation can assert its own rights under the Free Exercise Clause and instead examine[d] the rights at issue as those of the corporate owners." *Id.* at 1119. The court concluded that the pharmacy was "an extension of the beliefs of members of the Stormans family, and that the beliefs of the Stormans family are the beliefs of" the pharmacy. *Id.* at 1120. Because the pharmacy did "not present any free exercise rights of its own different from or greater than its owners' rights," the Ninth Circuit held, as it had in *Townley*, that the company had "standing to assert the free exercise rights of its owners." *Id.*

Appellants argue that Conestoga is permitted to assert the free exercise claims of the Hahns, its owners, under the *Townley/Stormans* "passed through" theory. After carefully considering the Ninth Circuit's reasoning, we are not persuaded. We decline to adopt the *Townley/Stormans* theory, as we believe that it rests on erroneous assumptions regarding the very nature of the corporate form. In fact, the Ninth Circuit did not mention certain basic legal principles governing the status of a corporation

and its relationship with the individuals who create and own the entity. It is a fundamental principle that "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created" the corporation. *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). The "passed through" doctrine fails to acknowledge that, by incorporating their business, the Hahns themselves created a distinct legal entity that has legally distinct rights and responsibilities from the Hahns, as the owners of the corporation. *See Barium Steel Corp. v. Wiley*, 108 A.2d 336, 341 (Pa. 1954) ("It is well established [under Pennsylvania law] that a corporation is a distinct and separate entity, irrespective of the persons who own all its stock."). The corporate form offers several advantages "not the least of which was limitation of liability," but in return, the shareholder must give up some prerogatives, "including that of direct legal action to redress an injury to him as primary stockholder in the business." *Kush v. Am. States Ins. Co.*, 853 F.2d 1380, 1384 (7th Cir. 1988). Thus, under Pennsylvania law—where Conestoga is incorporated—"[e]ven when a corporation is owned by one person or family, the corporate form shields the individual members of the corporation from personal liability." *Kellytown Co. v. Williams*, 426 A.2d 663, 668 (Pa. Super. Ct. 1981).

Since Conestoga is distinct from the Hahns, the Mandate does not actually require *the Hahns* to do anything. All responsibility for complying with the Mandate falls on *Conestoga*. Conestoga "is a closely-

held, family-owned firm, and [we] suspect there is a natural inclination for the owners of such companies to elide the distinction between themselves and the companies they own." *Grote v. Sebelius*, 708 F.3d 850, 857 (7th Cir. 2013) (Rovner, J., dissenting). But, it is Conestoga that must provide the funds to comply with the Mandate—not the Hahns. We recognize that, as the sole shareholders of Conestoga, ultimately the corporation's profits will flow to the Hahns. But, "[t]he owners of an LLC or corporation, even a closely-held one, have an obligation to respect the corporate form, on pain of losing the benefits of that form should they fail to do so." *Id.* at 858 (Rovner, J., dissenting). "The fact that one person owns all of the stock does not make him and the corporation one and the same person, nor does he thereby become the owner of all the property of the corporation." *Wiley*, 108 A.2d at 341. The Hahn family chose to incorporate and conduct business through Conestoga, thereby obtaining both the advantages and disadvantages of the corporate form. We simply cannot ignore the distinction between Conestoga and the Hahns. We hold—contrary to *Townley* and *Stormans*—that the free exercise claims of a company's owners cannot "pass through" to the corporation.

B.

Next, we consider Conestoga's RFRA claim. Under the RFRA, "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability [unless the burden] (1) is in furtherance

of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb-1(a)-(b). As with the inquiry under the Free Exercise Clause, our preliminary inquiry is whether a for-profit, secular corporation can assert a claim under the RFRA. Under the plain language of the statute, the RFRA only applies to a "person's exercise of religion." *Id.* at § 2000bb-1(a).

Our conclusion that a for-profit, secular corporation cannot assert a claim under the Free Exercise Clause necessitates the conclusion that a for-profit, secular corporation cannot engage in the exercise of religion. Since Conestoga cannot exercise religion, it cannot assert a RFRA claim. We thus need not decide whether such a corporation is a "person" under the RFRA.

V.

Finally, we consider whether the Hahns, as the owners of Conestoga, have viable Free Exercise Clause and RFRA claims on their own. For the same reasons that we concluded that the Hahns' claims cannot "pass through" Conestoga, we hold that the Hahns do not have viable claims. The Mandate does not impose any requirements on the Hahns. Rather, compliance is placed squarely on Conestoga. If Conestoga fails to comply with the Mandate, the penalties—including fines, *see* 26 U.S.C. § 4980D, and civil enforcement, *see* 29 U.S.C. § 1132—would be brought against Conestoga, not the Hahns. As the Hahns have decided to utilize the corporate form,

they cannot "move freely between corporate and individual status to gain the advantages and avoid the disadvantages of the respective forms." *Potthoff v. Morin*, 245 F.3d 710, 717 (8th Cir. 2001) (quoting *Kush*, 853 F.2d at 1384). Thus, we conclude that the Hahns are not likely to succeed on their free exercise and RFRA claims.

VI.

As Appellants have failed to show that they are likely to succeed on the merits of their Free Exercise Clause and RFRA claims, we need not decide whether Appellants have shown that they will suffer irreparable harm, that granting preliminary relief will not result in even greater harm to the Government, and that the public interest favors the relief of a preliminary injunction. *See NutraSweet Co.*, 176 F.3d at 153 ("A plaintiff's failure to establish any element in its favor renders a preliminary injunction inappropriate."). Therefore, we will affirm the District Court's order denying Appellants' motion for a preliminary injunction.

* * *

We recognize the fundamental importance of the free exercise of religion. As Congress stated, in passing the RFRA and restoring the compelling interest test to laws that substantially burden religion, "the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution." 42 U.S.C. §

2000bb(a). Thus, our decision here is in no way intended to marginalize the Hahns' commitment to the Mennonite faith. We accept that the Hahns sincerely believe that the termination of a fertilized embryo constitutes an "intrinsic evil and a sin against God to which they are held accountable," (Compl. ¶ 30), and that it would be a sin to pay for or contribute to the use of contraceptives which may have such a result. We simply conclude that the law has long recognized the distinction between the owners of a corporation and the corporation itself. A holding to the contrary—that a for-profit corporation can engage in religious exercise—would eviscerate the fundamental principle that a corporation is a legally distinct entity from its owners.

Conestoga Wood Specialties Corp., et al. v. U.S. Dep't of Health & Human Servs., et al., (No. 13-1144)

JORDAN, *Circuit Judge*, dissenting.

Having previously dissented from the denial of a stay pending appeal in this case, I now have a second opportunity to consider the government's violation of the religious freedoms of Conestoga Wood Specialties Corporation ("Conestoga") and its owners, the Hahns, a family of devout Mennonite Christians who believe in the sanctity of human life. The Hahns do not want to be forced to pay for other people to obtain contraceptives and sterilization services, particularly the drugs known as "Plan B" (or the "morning after pill") and "Ella" (or the "week after pill"), which they view as chemical killers of actual lives in being. Sadly, the outcome for the

Hahns and their business is the same this time as it was the last time they were before us. My colleagues, at the government's urging, are willing to say that the Hahns' choice to operate their business as a corporation carries with it the consequence that their rights of conscience are forfeit.

That deeply disappointing ruling rests on a cramped and confused understanding of the religious rights preserved by Congressional action and the Constitution. The government takes us down a rabbit hole where religious rights are determined by the tax code, with non-profit corporations able to express religious sentiments while for-profit corporations and their owners are told that business is business and faith is irrelevant. Meanwhile, up on the surface, where people try to live lives of integrity and purpose, that kind of division sounds as hollow as it truly is. I do not believe my colleagues or the District Court judge whose opinion we are reviewing are ill-motivated in the least, but the outcome of their shared reasoning is genuinely tragic, and one need not have looked past the first row of the gallery during the oral argument of this appeal, where the Hahns were seated and listening intently, to see the real human suffering occasioned by the government's determination to either make the Hahns bury their religious scruples or watch while their business gets buried. So, as I did the last time this case was before us, I respectfully dissent.

I. Background

Five members of the Hahn family – Norman,

Elizabeth, Norman Lemar, Anthony, and Kevin – own 100 percent of Conestoga, which Norman founded nearly fifty years ago and which, as noted by the Majority, is a Pennsylvania corporation that manufactures wood cabinets. (Maj. Op. at 12.) The Hahns are hands-on owners. They manage their business and try to turn a profit, with the help of Conestoga's 950 full-time employees. It is undisputed that the Hahns are entirely committed to their faith, which influences all aspects of their lives. They feel bound, as the District Court observed, "to operate Conestoga in accordance with their religious beliefs and moral principles." *Conestoga Wood Specialties Corp. v. Sebelius*, No. 12-6744, 2013 WL 140110, at *3 (E.D. Pa. Jan. 11, 2013). One manifestation of that commitment is the "Statement on the Sanctity of Human Life" adopted by Conestoga's Board of Directors on October 31, 2012, proclaiming that

> [t]he Hahn Family believes that human life begins at conception (at the point where an egg and sperm unite) and that it is a sacred gift from God and only God has the right to terminate human life. Therefore it is against our moral conviction to be involved in the termination of human life through abortion, suicide, euthanasia, murder, or any other acts that involve the deliberate taking of human life.

Id. at *18 n.5.

Accordingly, the Hahns believe that facilitating

the use of contraceptives, especially ones that destroy a fertilized ovum [1] is a violation of their core religious beliefs. (Am.

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[1] Their concern seems aimed particularly at contraceptives that work after conception (*see* Am. Compl. at 9 (noting concern over mandated "drugs or devices that may cause the demise of an already conceived but not yet attached human embryo, such as 'emergency contraception' or 'Plan B' drugs (the so called 'morning after' pill)"), and the concern apparently increases the further along in the development of the fertilized egg that the contraceptive action of a drug or device takes place (*see id.* at 10 (discussing objections to "a drug called 'ella' (the so called 'week after' pill), which studies show can function to kill embryos even after they have attached to the uterus, by a mechanism similar to the abortion drug RU-486"). Being forced to assist in the acquisition and use of abortifacients is obviously of great concern to them. (*See* Appellants' Opening Br. at 10-11 ("[T]he Hahns believe that it would be sinful and immoral for them to intentionally participate in, pay for, facilitate, or otherwise support any contraception with an abortifacient effect through health insurance coverage they offer at Conestoga.").)

At oral argument, counsel for the government insisted that "abortifacient" is a "theological term," and that, "for federal law purposes, a device that prevents a fertilized egg from implanting in the uterus," like Plan B and Ella, "is not an abortifacient." (Oral Arg. at 37:13-37:45.) There was something telling in that lecture, and not what counsel intended. One might set aside the highly questionable assertion that "abortifacient" is a "theological" and not a scientific medical term, which must come as a surprise to the editors of dictionaries that include entries like the following: "abortifacient [MED] Any agent that induces abortion." McGraw-Hill Dictionary of Scientific and Technical Terms, 6th ed. (2003). And one could further ignore what appears to be an ongoing debate on whether drugs like Ella are technically abortifacients. (*See Amicus* Br. of Ass'n of Am. Physicians & Surgeons at 11 (arguing that "the low pregnancy rate for women who take *ella* four or five days after intercourse

suggests that the drug *must* have an 'abortifacient' quality"); D.J. Harrison & J.G. Mitroka, *Defining Reality: The Potential Role of Pharmacists in Assessing the Impact of Progesterone Receptor Modulators and Misoprostol in Reproductive Health*, 45 Annals Pharmacotherapy 115, 116 (Jan. 2011) (cited in Ass'n of Am. Physicians & Surgeons et al. Amicus Br. at 10 n.15) (concluding that, based on data, "it can be reasonably expected that the [FDA-approved] dose of ulipristal [Ella] will have an abortive effect on early pregnancy in humans").) Though the Hahns' objections to contraception may be more intense as a zygote matures and implants, the point of this case, after all, is not who among contending doctors and scientists may be correct about the abortion-inducing qualities of Ella or other drugs that the government wants to make the Hahns and their business buy for employees through forced insurance coverage. Whether a fertilized egg, being acted upon by a drug or device, is aborted after implantation or is never implanted at all is not pertinent to the Hahns' belief that a human life comes into being at conception and therefore the destruction of that entity is the taking of a human life. That belief is the point of this case, and the government is in no position to say anything meaningful about the Hahns' perspective on when life begins. But counsel's comment during argument does say something meaningful about the government's desire to avoid anything that might smack of religion in this case involving questions of religious freedom. The government evidently would like to drain the debate of language that might indicate the depth of feeling the Hahns have about what they are being coerced to do. "Keep the conversation as dry and colorless as possible," is the message. Don't let anything that sounds like "abortion" come up, lest the weight of that word disturb a happily bland consideration of corporate veils and insurance contracts. Like it or not, however, big issues – life and death, personal conscience, religious devotion, the role of government, and liberty – are in play here, and the government's effort to downplay the stakes is of no help. It does, however, highlight the continuing importance of the First Amendment, which "is an effort, not entirely forlorn, to interpose a bulwark between the prejudices of any official, legislator or judge and the stirrings of the spirit." *EEOC v.*

Compl. ¶ 30, 32.) Conestoga, at the Hahns' direction, had previously provided health insurance that omitted coverage for contraception. (Am. Compl. ¶ 3.) Then came the Patient Protection and Affordable Care Act (the "ACA") and related regulations, and the Hahns' previous decisions about employee benefits were no longer something the government would tolerate. Under rules effectively written by an entity called the "Institute of Medicine,"[2] corporations like Conestoga must purchase employee health insurance plans that include coverage for

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Townley Eng'g & Mfg. Co., 859 F.2d 610, 624 (9th Cir. 1988) (Noonan, J., dissenting).

[2] To attribute the rules to government personnel is unduly generous. As the Majority obliquely observes (*see* Maj. Op. at 11), the rules in question here are not the product of any legislative debate, with elected representatives considering the political sensitivities and constitutional ramifications of telling devout Mennonites to fund the destruction of what they believe to be human lives. They are not even the result of work within an administrative agency of the United States. They are instead the result of the ACA assigning regulatory authority to a subunit of the Department of Health and Human Services ("HHS") known as the Health Resources and Services Administration, 42 U.S.C. § 300gg-13(a)(4), which in turn turned the drafting over to the Institute of Medicine. (*See* Maj. Op. at 11.) What the Majority does not do is identify what the Institute of Medicine is. It is not an agency of the United States government, or of any other public entity. It is a private organization that, according to its website, "works outside of government to provide unbiased and authoritative advice to decision makers and the public." *See* About the IOM, http://www.iom.edu/About-IOM.aspx (last visited July 25, 2013). That self-serving declaration of its qualifications will not be of much comfort to those who wonder how a private organization, not answerable to the public, has ended up dictating regulations that the government insists overrides the Appellants' constitutional rights to religious liberty.

"[a]ll Food and Drug Administration [("FDA")] approved contraceptive methods, sterilization procedures, and patient education and counseling" – including so-called emergency contraceptives such as Plan B and Ella – "for all women with reproductive capacity, as prescribed by a provider." 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012) (alterations in original) (internal quotation marks omitted). This is what has been dubbed the "contraception mandate" (the "Mandate"), and it brooks no exception for those, like the Appellants, who believe that supporting the use of certain contraceptives is morally reprehensible and contrary to God's word.[3] If the Hahns fail to have Conestoga submit to the offending regulations, the company will be subject to a "regulatory tax" – a penalty or fine – that will amount to about $95,000 per day and will rapidly destroy the business and the 950 jobs that go with it.[4] (*See* Maj. Op. at 13 (noting

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[3] There are plenty of other exceptions, however, as I will discuss later. *See infra* Part III.A.2.b.i.

[4] According to 26 U.S.C. § 4980D(a), "[t]here is ... a tax on any failure of a group health plan to meet the requirements of chapter 100 (relating to group health plan requirements)." The $95,000 estimate of the penalty takes account only of Conestoga's 950 employees. The actual penalty could amount to much more, given that the statute subjects noncompliant companies to a $100 per-day penalty for "any failure" to provide the mandated coverage "with respect to each individual to whom such failure relates." *Id.* § 4980D(b)(1). Presumably, "'individual' means each individual insured" by the company, *Hobby Lobby Stores, Inc. v. Sebelius*, __ F.3d __, 2013 WL 3216103, at *5 (10th Cir. 2013) (en banc), including employees' family members. Regardless, dead is dead, and Conestoga would as surely die a rapid death under the weight of $95,000 per-day fines as it would under even higher fines. In the alternative, Conestoga presumably could drop employee health

that "Conestoga is currently complying with the Mandate").)

Conestoga and the Hahns now argue that the Mandate is forcing them, day by day, to either disobey their religious convictions or to incur ruinous fines. That Hobson's choice, they say, violates both the First Amendment and the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb-1. I agree.

II. Standard of Review

To qualify for preliminary injunctive relief, a litigant must demonstrate "(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). "We review the denial of a preliminary injunction for an abuse of discretion, an error of law, or a clear mistake in the consideration of proof," and "any determination that is a prerequisite to the issuance of an injunction is reviewed according to the standard applicable to that particular determination." *Id.* (alterations and internal quotation marks omitted). We therefore "exercise

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insurance altogether, and it would then face a reduced fine of $2,000 per full-time employee per year (totaling $1.9 million). *See* 26 U.S.C. § 4980H. Neither party has briefed that option, and it is unclear what additional consequences might follow from such action, including upward pressure on wages, etc.

plenary review over the district court's conclusions of law and its application of law to the facts ... ." *Id.* (internal quotation marks omitted). Highly relevant to this case, "a court of appeals must reverse if the district court has proceeded on the basis of an erroneous view of the applicable law." *Id.* (internal quotation marks omitted).

The Majority gives short shrift to the dispute over the standard of review that emerged during the earlier appeal in this case. My colleagues say simply that "[a] plaintiff's failure to establish any element in its favor renders a preliminary injunction inappropriate." (Maj. Op. at 14 (quoting *NutraSweet Co. v. Vit-Mar Enters., Inc.*, 176 F.3d 151, 153 (3d Cir. 1999)) (alteration in original) (internal quotation marks omitted)). That may be true, but it fails to address the problem that arose from the District Court's erroneous application of a more rigid standard than our case law requires. In explaining away the numerous decisions around the country that have decided that the government should be preliminarily enjoined from enforcing the Mandate, the Court claimed that those other decisions were the result of "a less rigorous standard" for the granting of preliminary injunctive relief than the standard in this Circuit. *Conestoga Wood Specialties Corp.*, 2013 WL 140110, at *4. More specifically, the Court said that those decisions "applied a 'sliding scale approach,' whereby an unusually strong showing of one factor lessens a plaintiff's burden in demonstrating a different factor."[5] *Id.* It then

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[5] *See Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *2 (7th Cir. Dec. 28, 2012) (noting that "[t]he more the balance of

contrasted that approach with what it characterized as this Court's approach, saying, "the Third Circuit ... has no such 'sliding scale' standard, and Plaintiffs must show that all four factors favor preliminary relief." *Id.* The Majority hardly mentions the District Court's mistaken belief that our standard is more daunting than the standard employed by other courts, nor that the District Court failed to apply binding precedent in which we have adopted the functional equivalent of a sliding scale standard.

It is true that we have not used the label "sliding

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harms tips in favor of an injunction, the lighter the burden on the party seeking the injunction to demonstrate that it will ultimately prevail," and granting preliminary injunction pending appeal); *Grote v. Sebelius*, 708 F.3d 850, 853 n.2 (7th Cir. 2013) (adopting the reasoning of *Korte* and applying the same "sliding scale" standard); *Monaghan v. Sebelius*, __ F. Supp. 2d __, 2012 WL 6738476, at *3 (E.D. Mich. Dec. 30, 2012) ("Courts ... may grant a preliminary injunction even where the plaintiff fails to show a strong or substantial probability of success on the merits, but where he at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if the injunction is issued."); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, No. 12-3459, 2012 WL 6951316, at *5 (W.D. Mo. Dec. 20, 2012) (applying a sliding scale standard and concluding that "the balance of equities tip strongly in favor of injunctive relief in this case and that Plaintiffs have raised questions concerning their likelihood of success on the merits that are so serious and difficult as to call for more deliberate investigation"); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 113 (D.D.C. 2012) (applying a sliding scale standard by which, "[i]f the movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor" (alteration in original) (internal quotation marks omitted)).

scale" to describe our standard for preliminary injunctions, as numerous other circuit courts of appeals have.[6] But we have said that, "in a situation

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[6] At least six circuits have explicitly adopted a "sliding scale" approach for evaluating a motion for a preliminary injunction. *See McCormack v. Hiedeman*, 694 F.3d 1004, 1016 n.7 (9th Cir. 2012) ("[T]he 'sliding scale' approach to preliminary injunctions remains valid: A preliminary injunction is appropriate when a plaintiff demonstrates that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." (alteration and internal quotation marks omitted)); *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291-92 (D.C. Cir. 2009) ("The four factors have typically been evaluated on a 'sliding scale.' If the movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor."); *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544, 547 (7th Cir. 2007) (endorsing a "'sliding scale' approach" pursuant to which "if the appeal has some though not necessarily great merit, then the showing of harm of ... [great] magnitude ... would justify the granting of an injunction pending appeal provided ... that the defendant would not suffer substantial harm from the granting of the injunction"); *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 526 (4th Cir. 2003) ("In applying th[e] four-factor test, the irreparable harm to the plaintiff and the harm to the defendant are the two most important factors. Emphasis on the balance of these first two factors results in a sliding scale that demands less of a showing of likelihood of success on the merits when the balance of hardships weighs strongly in favor of the plaintiff, and vice versa." (alteration and internal quotation marks omitted)); *Gately v. Commonwealth of Massachusetts*, 2 F.3d 1221, 1232 (1st Cir. 1993) (noting "the general principle that irreparable harm is subject to a sliding scale analysis, such that the showing of irreparable harm required of a plaintiff increases in the presence of factors ... which cut against a court's traditional authority to issue equitable relief"); *Fla. Med. Ass'n, Inc. v. U.S. Dep't of Health, Educ. & Welfare*, 601 F.2d 199, 203 n.2 (5th Cir. 1979) (when evaluating a motion for a preliminary

where factors of irreparable harm, interests of third parties and public considerations strongly favor the moving party, an injunction might be appropriate even though plaintiffs did not demonstrate as strong a likelihood of ultimate success as would generally be required." *Constructors Ass'n of W. Pa. v. Kreps*, 573 F.2d 811, 815 (3d Cir. 1978). On another occasion, we observed that "[a]ll of [the four preliminary injunction] factors often are weighed together in the final decision and the strength of the plaintiff's showing with respect to one may affect what will suffice with respect to another." *Marxe v. Jackson*, 833 F.2d 1121, 1128 (3d Cir. 1987). And again, we have said, "proper judgment entails a 'delicate balancing' of all elements." *Eli Lilly & Co. v. Premo Pharm. Labs., Inc.*, 630 F.2d 120, 136 (3d Cir. 1980) (quoting *Kreps*, 573 F.2d at 815) (internal quotation marks omitted).[7] If those precedents are

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injunction, "a sliding scale can be employed, balancing the hardships associated with the issuance or denial of a preliminary injunction with the degree of likelihood of success on the merits").

[7] As noted, *see supra* note 6, six circuits have used the label "sliding scale" to describe their approach to reviewing requests for preliminary injunctions. Almost all of the remaining circuits have, like us, adopted an approach that, if not in name, mirrors the so-called sliding scale approach. *See Lankford v. Sherman*, 451 F.3d 496, 503 (8th Cir. 2006) ("No single factor is dispositive, as the district court must balance all factors to determine whether the injunction should issue."); *Doe v. Sundquist*, 106 F.3d 702, 707 (6th Cir. 1997) ("We are mindful that even when a plaintiff's probability of success on the merits of a claim is not very high, a preliminary injunction may be appropriate if the plaintiff is in serious danger of irreparable harm absent an injunction. Thus we have observed that the degree of likelihood of success that need be shown to support a

not the expression and application of a sliding scale, allowing the strength of a showing on one factor to compensate for a weaker but still positive showing on another, I confess I do not know what to make of them. The District Court ignored the import of *Kreps*, *Marxe*, and *Eli Lilly*, despite our saying that a party can succeed in gaining injunctive relief if the threatened harm is particularly great and offsets a showing on "likelihood of success" that is less than

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preliminary injunction varies inversely with the degree of injury the plaintiff might suffer."); *Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co. of N.Y., Inc.*, 749 F.2d 124, 125 (2d Cir. 1984) (per curiam) ("In our circuit a preliminary injunction will be issued when there is a showing of (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." (internal quotation marks omitted)); *Otero Sav. & Loan Ass'n v. Fed. Reserve Bank of Kansas City, Mo.*, 665 F.2d 275, 278 (10th Cir. 1981) ("The Tenth Circuit has adopted the Second Circuit's liberal definition of the 'probability of success' requirement. When the other three requirements for a preliminary injunction are satisfied, it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." (internal quotation marks omitted)).

Only one circuit appears to have rejected a balancing approach outright. The Eleventh Circuit "has not recognized" a sliding scale approach where there are "sufficiently serious questions going to the merits [that] make them a fair ground for litigation *and* [where there is] a balance of hardships tipping decidedly toward the party requesting preliminary relief." *Snook v. Trust Co. of Ga. Bank of Savannah, N.A.*, 909 F.2d 480, 483 n.3 (11th Cir. 1990) (internal quotation marks omitted).

might ordinarily be required. The Court thus erred, and we should say so.

Unlike the Majority, which tacitly endorses the District Court's application of an incorrect and unduly restrictive standard of review, I would apply the standard mandated by our own case law and used in the vast majority of our sister circuits.[8]

III. Discussion

The Majority, like the District Court, evaluates only one of the four preliminary injunction factors: the likelihood of the Hahns' and Conestoga's success on the merits.[9] Holding that the "Appellants have

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[8] I have discussed the correct standard of review at length only to emphasize that, in view of the particularly heavy and irreparable harm that the Hahns and Conestoga are now suffering and will continue to suffer as a result of the Majority's holding, *see infra* Part III.B, this case clearly meets the requirements for a preliminary injunction. But even under the stricter standard applied by the District Court, I would still hold, for the reasons I provide in the remainder of this dissent, that the Hahns and Conestoga have made the necessary showing. *See Hobby Lobby*, 2013 WL 3216103, at *8 ("[W]e need not resolve whether this relaxed standard would apply here, given that a majority of the court holds that Hobby Lobby and Mardel have satisfied the likelihood-of-success prong under the traditional standard.").

[9] The government has not asserted that the Anti-Injunction Act, which precludes judicial consideration of suits seeking to "restrain[] the assessment or collection of any [federal] tax," 26 U.S.C. § 7421(a), applies to this case. As a result, that line of argument is waived. *See Hobby Lobby*, 2013 WL 3216103, at *35 (Gorsuch, J., concurring) ("[A] waivable defense ... is all the [Anti-Injunction Act] provides."). At any rate, I would hold with the en banc ruling of the United States Court of Appeals for the

failed to show that they are likely to succeed on the merits of their Free Exercise Clause and RFRA claims," the Majority "[does] not decide whether Appellants have shown that they will suffer irreparable harm, that granting preliminary relief will not result in even greater harm to the Government, [or] that the public interest favors the relief of a preliminary injunction." (Maj. Op. at 29.) My colleagues thereby avoid addressing, let alone weighing, the additional factors. I believe that they are wrong about the likelihood of success that both the Hahns and Conestoga should be credited with, and I am further persuaded that the remaining three factors, particularly the showing of irreparable harm, weigh overwhelmingly in favor of relief, as I will endeavor to explain.

A. Likelihood of Success on the Merits

This case is one of many filed against the government in recent months by for-profit corporations and their owners seeking protection from the Mandate. *Conestoga Wood Specialties Corp.*, 2013 WL 140110, at *5. So far, most of those cases have reached the preliminary injunction stage only, and a clear majority of courts has determined that temporary injunctive relief is in order.[10] I join

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Tenth Circuit that the Anti-Injunction Act does not apply in a case like this. *See id.* at *7 ("[The for-profit corporate appellants] are not seeking to enjoin the collection of taxes or the execution of any IRS regulation; they are seeking to enjoin the enforcement, by whatever method, of one HHS regulation that they claim violates their RFRA rights.").

[10] *See Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-00104-EGS, slip op. at 1 (D.C. Cir. Mar. 29, 2013)

(granting on court's own motion injunction pending appeal after first denying plaintiffs' motion on March 21, 2013); *Annex Med., Inc. v. Sebelius*, No. 13-1118, slip op. at 6 (8th Cir. Feb. 1, 2013) (granting injunction pending appeal); *Grote v. Sebelius*, 708 F.3d 850, 855 (7th Cir. 2013) (same); *Korte*, 2012 WL 6757353, at *2 (granting motion for injunction pending appeal because appellants "have established both a reasonable likelihood of success on the merits and irreparable harm, and [because] the balance of harms tips in their favor"); *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357, slip op. at 1 (8th Cir. Nov. 28, 2012) (granting "[a]ppellants' motion for stay pending appeal," without further comment); *Hobby Lobby Stores, Inc. v. Sebelius*, No. 5:12-cv-01000-HE, slip op. at 3 (W.D. Okla. July 19, 2013) (enjoining government "from any effort to apply or enforce, as to plaintiffs, the substantive requirements imposed in 42 U.S.C. § 300gg-13(a)(4) and at issue in this case, or the penalties related thereto"); *Beckwith Elec. Co. v. Sebelius*, No. 8:13-cv-0648, 2013 WL 3297498, at *19 (M.D. Fla. June 25, 2013) (holding that religious rights are "not relinquished by efforts to engage in free enterprise under the corporate form," and granting motion for preliminary injunction); *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 WL 3071481, at *12 (W.D. Pa. June 18, 2013) (granting motion for preliminary injunction); *Hartenbower v. U.S. Dep't of Health & Human Servs.*, No. 1:13-CV-02253 (N.D. Ill. Apr. 18, 2013) (granting unopposed motion for preliminary injunction); *Hall v. Sebelius*, No. 13-0295 (D. Minn. Apr. 2, 2013) (granting unopposed motion for preliminary injunction); *Tonn & Blank Constr., LLC v. Sebelius*, No. 1:12-CV-325 (N.D. Ind. Apr. 1, 2013) (granting unopposed motion for preliminary injunction); *Bick Holding, Inc. v. Sebelius*, No. 4:13-cv-00462-AGF (E.D. Mo. Apr. 1, 2013) (granting unopposed motion for preliminary injunction); *Lindsay v. U.S. Dep't of Health & Human Servs.*, No. 13-c-1210, slip op. at 1 (N.D. Ill. Mar. 20, 2013) (preliminary injunction granted with "agreement of the parties"); *Monaghan v. Sebelius*, __ F. Supp. 2d __, 2013 WL 1014026, at *11 (granting preliminary injunction because "[t]he Government has failed to satisfy its burden of showing that its actions were narrowly tailored to serve a compelling interest," and plaintiffs therefore "established at least some likelihood of

succeeding on the merits of their RFRA claim"); *Sioux Chief Mfg. Co. v. Sebelius*, No. 13-0036, slip op. (W.D. Mo. Feb. 28, 2013) (granting unopposed motion for preliminary injunction); *Triune Health Grp., Inc. v. U.S. Dep't of Health & Human Servs.*, No. 12-06756, slip op. at 1 (N.D. Ill. Jan. 3, 2013) (granting motion for preliminary injunction); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-CV-92-DDN, 2012 WL 6738489, at *7 (E.D. Mo. Dec. 31, 2012) (holding that "plaintiffs are entitled to injunctive relief that maintains the status quo until the important relevant issues have been more fully heard"); *Am. Pulverizer*, 2012 WL 6951316, at *5 (granting preliminary injunction because "the balance of equities tip strongly in favor of injunctive relief in this case and [because] Plaintiffs have raised questions concerning their likelihood of success on the merits that are so serious and difficult as to call for more deliberate investigation"); *Tyndale*, 904 F. Supp. 2d at 129 (granting preliminary injunction to publishing corporation and its president because they had "shown a strong likelihood of success on the merits of their RFRA claim," and because the other preliminary injunction factors favored granting the motion); *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 999 (E.D. Mich. 2012) (granting preliminary injunction to for-profit, family-owned and operated corporation and holding that "[t]he harm in delaying the implementation of a statute that may later be deemed constitutional must yield to the risk presented here of substantially infringing the sincere exercise of religious beliefs"); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1299 (D. Colo. 2012) (granting preliminary injunction, holding that "[t]he balance of the equities tip strongly in favor of injunctive relief in this case"). *But see Eden Foods, Inc. v. Sebelius*, No. 13-1677, slip op. at 2 (6th Cir. June 28, 2013) (denying injunction pending appeal and stating that it is "not persuaded, at this stage of the proceedings, that a for-profit corporation has rights under the RFRA" and that burden to company's owner "is too attenuated"); *Autocam Corp. v. Sebelius*, No. 12-2673, slip op. at 3 (6th Cir. Dec. 28, 2012) (denying motion for injunction pending appeal); *Mersino Mgmt. Co. v. Sebelius*, No. 13-cv-11296, slip op. at 2 (E.D. Mich. July 11, 2013) (denying motion for preliminary injunction); *Armstrong v. Sebelius*, No. 13-cv-

that consensus, and note also the recent en banc decision of the United States Court of Appeals for

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00563 (D. Colo. May 10, 2013) (denying motion for preliminary injunction); *MK Chambers Co. v. U.S. Dep't of Health & Human Servs.*, No. 13-11379, 2013 WL 1340719, at *7 (E.D. Mich. Apr. 3, 2013) (denying request for a temporary restraining order); *Briscoe v. Sebelius*, No. 13-00285, 2013 WL 755413, at *5 (D. Colo. Feb. 27, 2013) (relying on recently overturned *Hobby Lobby* decisions to deny temporary restraining order).

In addition to those cases, the Fourth Circuit recently declined to rule on a challenge to the contraception Mandate in a case remanded to it by the Supreme Court, because the plaintiffs "did not challenge these regulations, or make any argument related to contraception or abortifacients, in the district court, in their first appeal ... , or in their Supreme Court briefs." *Liberty Univ., Inc. v. Lew*, No. 10-2347, slip op. at 58, __ F.3d __ (4th Cir. July 11, 2013).

The Sixth Circuit's order denying preliminary injunctive relief in *Autocam* is of little persuasive value. In its order, the court acknowledged "conflicting decisions," but it denied injunctive relief because the district court in that case issued a "reasoned opinion" and because "the Supreme Court[] [had] recent[ly] deni[ed] ... an injunction pending appeal in *Hobby Lobby*." *Autocam*, No. 12-2673, slip op. at 2 (citing *Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641 (Dec. 26, 2012) (Sotomayor, J., as Circuit Justice). The Supreme Court opinion the *Autocam* court referred to was an in-chambers decision by Justice Sotomayor, acting alone, denying the plaintiffs' motion for an injunction pending appellate review. *Hobby Lobby Stores*, 133 S. Ct. 641. She denied the motion under the particular standard for issuance of an extraordinary writ by the Supreme Court, *id.* at 643, which differs significantly from our standard for evaluating a motion for a preliminary injunction. Under that more demanding standard, the entitlement to relief must be "'indisputably clear.'" *Id.* (quoting *Lux v. Rodrigues*, 131 S. Ct. 5, 6 (Sept. 30, 2010) (Roberts, C.J., as Circuit Justice)). The *Autocam* court's reliance on her opinion is therefore misplaced, and its decision is otherwise devoid of explanation.

the Tenth Circuit holding that two for profit companies had "established [that] they are likely to succeed on their RFRA claim" and that the Mandate threatened them with irreparable harm.[11] *Hobby Lobby Stores, Inc. v. Sebelius*, __ F.3d __, 2013 WL 3216103, at *24 (10th Cir. June 27, 2013) (en banc).

To demonstrate a likelihood of success on the merits, a "plaintiff need only prove a prima facie case, not a certainty that he or she will win." *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 173 (3d Cir. 2001). "[L]ikelihood of success" means that a plaintiff has "a reasonable chance, or probability, of winning." *Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 229 (3d Cir. 2011) (en banc). It "does not mean more likely than not."[12] *Id.* In the sense pertinent here, the term "likelihood" embodies "[t]he quality of offering a *prospect* of success," or showing some promise. Oxford English Dictionary, Vol. I, at 1625 (compact ed., 1986) (emphasis added). The Appellants have shown the requisite prospect of success.

1. Conestoga's Right to Assert RFRA and First Amendment Claims

I begin where the Majority begins and ends, with

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[11] The *Hobby Lobby* court remanded the case for a determination regarding the remaining two preliminary injunction factors. *Id.* at *26.

[12] Indeed, because the showing necessary for an injunction falls well below certainty, we have held that "this 'probability' ruling" is insufficient to establish that a party has "prevail[ed]" based solely on its being awarded a preliminary injunction. *Milgram*, 650 F.3d at 229.

the issue of Conestoga's claim to religious liberty.[13] This may be thought of as a question of standing, and, though it was not couched that way in the briefing or argument before us, it has been addressed as such by other courts. *E.g.*, *Hobby Lobby*, 2013 WL 3216103, at *6; *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 114-19 (D.D.C. 2012); *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 987-90 (E.D. Mich. 2012). However it may be framed, the government's assertion and the Majority's conclusion that Conestoga lacks any right to the free exercise of religion is flawed because the Constitution nowhere makes the "for-profit versus non-profit" distinction invented by the government, and the language and logic of Supreme Court jurisprudence justify recognizing that for-profit corporations like Conestoga are entitled to religious liberty.

The Majority declares that there is no "history of courts providing free exercise protection to corporations." (Maj. Op. at 20.) As my colleagues see it, "'[r]eligious belief takes shape within the minds and hearts of individuals, and its protection is one of the more uniquely human rights provided by the Constitution'" (*id.* at 20-21 (quoting *Conestoga Wood Specialties Corp.*, 2013 WL 140110, at *7)), so religion must be "an inherently 'human' right" that cannot be exercised by a corporation like Conestoga (*id.* at 21). That reasoning fails for several reasons.

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[13] As I am addressing the Majority's reasoning, I begin with this point rather than the statutory question of whether Conestoga is a "person" under RFRA. As I explain below, *see infra* note 23, I believe that it is.

First, to the extent it depends on the assertion that collective entities, including corporations, have no religious rights, it is plainly wrong, as numerous Supreme Court decisions have recognized the right of corporations to enjoy the free exercise of religion.[14] *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525-26 (1993)

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[14] The Majority thinks it important that corporations lack the anthropomorphic qualities of individual religious devotion – "'[t]hey do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors.'" (Maj. Op. at 21 (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012), *rev'd en banc*, No. 12-6294, 2013 WL 3216103 (10th Cir. June 27, 2013)); *see also id.* (citing *Hobby Lobby*, 2013 WL 3216103, at *51 (Briscoe, C.J., concurring in part and dissenting in part) (questioning "whether a corporation can 'believe' at all")); *id.* at 21-22 (citing *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 466 (2010) (Stevens, J., concurring in part and dissenting in part) ("It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires.")).) Of course, corporations do not picket, or march on Capitol Hill, or canvas door-to-door for moral causes either, but the Majority would not claim that corporations do not have First Amendment rights to free speech or to petition the government. Corporations have those rights not because they have arms and legs but because the people who form and operate them do, and we are concerned in this case with people, even when they operate through the particular form of association called a corporation. *See infra* note 17. It is perhaps no accident that the only support my colleagues put forward to show that a corporation's lack of body parts deprives it of religious liberty is a district court case that has been reversed, a dissent in a court of appeals case, and a dissent in a Supreme Court case. An argument that has lost three times is not necessarily wrong for that record, but maybe the record says something about the argument.

(recognizing the petitioner as a corporation whose congregants practiced the Santeria religion, and concluding that city ordinances violated the corporation's and its members' free exercise rights); *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 330 (1987) (recognizing the petitioner as a corporation in a case concerning free exercise rights); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.29 (1983) (allowing two corporations that operated schools but could not be characterized as "churches or other purely religious institutions" to assert free exercise rights).

Taking the argument to be somewhat narrower, though – that it is only for-profit corporations that are sealed off from First Amendment religious liberty – it still fails. There is no reason to suppose that a profit motive places a corporation further away from what is "inherently human" than other sorts of motives, so the distinction the Majority draws has no intrinsic logic to recommend it. It also places far too much weight on a supposed lack of precedent. While authority is admittedly scanty, that is in all probability because there has never before been a government policy that could be perceived as intruding on religious liberty as aggressively as the Mandate, so there has been little reason to address the issue.[15] And, in any event, there is an obvious

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[15] The press reports are not in the record, but one would have to have been cut off from all media to miss the uproar created by the Mandate. *See, e.g.*, Ethan Bronner, *A Flood of Suits Fights Coverage of Birth Control*, New York Times, Jan. 26, 2013, at A1 (describing "a high-stakes clash between religious freedom

counterpoint to the Majority's observation: there may not be directly supporting case law, but the "conclusory assertion that a corporation has no constitutional right to free exercise of religion is [also] unsupported by any cited authority." *McClure v. Sports & Health Club*, 370 N.W.2d 844, 850 (Minn. 1985). In fact, it appears that, far from rejecting the proposition that for-profit corporations may have religious liberty interests, the Supreme Court has reserved the issue for a later time. *Cf. First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (declining to "address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment"); *Amos*, 483 U.S. at 345 n.6 (Brennan, J., concurring in the judgment) (noting that "[i]t is also conceivable that some for-profit activities could have a religious character," and leaving open the issue of whether for-profit enterprises could have a religious exemption from Title VII of the Civil Rights Act of 1964); *id.* at 349 (O'Connor, J., concurring in the judgment) (expressly leaving open the same question).

The Majority slips away from its own distinction between for-profit and non-profit entities when it tries to support its holding with a citation to the Supreme Court's observation that the Free Exercise Clause "'secure[s] religious liberty in the individual by prohibiting any invasions thereof by civil authority.'" (Maj. Op. at 20 (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963))

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and health care access that appears headed to the Supreme Court").

(emphasis omitted).) If that out-of-context clause really meant, as the Majority argues, that the right was limited to individuals, then all groups would be left in the cold, not just for-profit corporations. But that is manifestly not what the quoted language means. Not only does the Majority's interpretation fly in the face of the already cited authority establishing that groups of people have free exercise rights as surely as each individual does, it falters simply as a matter of reason. To recognize that religious convictions are a matter of individual experience cannot and does not refute the collective character of much religious belief and observance.

Religious opinions and faith are in this respect akin to political opinions and passions, which are held and exercised both individually and collectively. "An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). And just as the Supreme Court has described the free exercise of religion as an "individual" right, *see Schempp*, 374 U.S. at 223, it has previously said the same thing of the freedom of speech, *see Gitlow v. New York*, 268 U.S. 652, 666 (1925) (calling freedom of speech a "fundamental personal right[]"), and still, notwithstanding that occasional characterization, there are a multitude of cases upholding the free speech rights of corporations. *E.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342 (2010) (recognizing that

"First Amendment protection extends to corporations" and listing cases to that effect). Indeed, the Supreme Court has specifically "rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" *Id.* At 343 (quoting *Bellotti*, 435 U.S. at 776). It thus does nothing to advance the discussion to say that the Free Exercise Clause secures religious liberty to individuals. Of course it does. That does not mean that associations of individuals, including corporations, lack free exercise rights.

I am not suggesting that corporations enjoy all of the same constitutionally grounded rights as individuals do. They do not, as the Supreme Court noted in *First National Bank of Boston v. Bellotti*, saying, "[c]ertain purely personal guarantees ... are unavailable to corporations and other organizations because the historic function of the particular guarantee has been limited to the protection of individuals." 435 U.S. at 778 n.14 (internal quotation marks omitted); *see Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 65-67 (1974) (declining to extend to a corporation the right to privacy to the same extent as individuals); *Wilson v. United States*, 221 U.S. 361, 382-86 (1911) (finding that the privilege against self-incrimination does not apply to corporations). The question in a case like this thus becomes "[w]hether or not a particular guarantee is 'purely personal.'" *Bellotti*, 435 U.S. at 778 n.14. And that, in turn, "depends on the nature, history, and purpose of the particular constitutional provision." *Id.*

Contrary to the Majority's conclusion, there is nothing about the "nature, history, and purpose" of religious exercise that limits it to individuals. Quite the opposite; believers have from time immemorial sought strength in numbers. They lift one another's faith and, through their combined efforts, increase their capacity to meet the demands of their doctrine. The use of the word "congregation" for religious groups developed for a reason. Christians, for example, may rightly understand the Lord's statement that, "where two or three are gathered together in my name, there am I in the midst of them," Matt. 18:20, to be not only a promise of spiritual outpouring but also an organizational directive. It thus cannot be said that religious exercise is a purely personal right, one that "cannot be utilized by or on behalf of any organization, such as a corporation." *United States v. White*, 322 U.S. 694, 699 (1944). It is exercised by organizations all the time.

Wait, says the government in response to such reasoning; don't get carried away by facts; any collective right to religious exercise must be limited to organizations that are specifically and exclusively dedicated to religious ends. As the government and the Majority see it, religious rights are more limited than other kinds of First Amendment rights. All groups can enjoy secular free expression and rights to assembly, but only "religious organizations" have a right to religious liberty. (*See* Appellee's Br. at 17 ("[W]hereas the First Amendment freedoms of speech and association are 'right[s] enjoyed by religious and secular groups alike," the First

Amendment's Free Exercise Clause 'gives special solicitude to the rights of religious organizations.'" (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706, 713 (2012))); Maj. Op. at 18, 22 (acknowledging that "First Amendment free speech rights apply to corporations," but declining to "draw the conclusion that, just because courts have recognized the free exercise rights of churches and other religious entities, it necessarily follows that for-profit, secular corporations can exercise religion").) Of course, that view leaves it to the government to decide what qualifies as a "religious organization," which ought to give people serious pause since one of the central purposes of the First Amendment is to keep the government out of the sphere of religion entirely. *Cf. Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 212 (1948) ("[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.").

Assuming, however, that the government had the competence to decide who is religious enough to qualify as a "religious organization,"[16] there is no

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[16] Some wading into those waters has become inevitable. A handful of federal statutes create exemptions for "a religious corporation, association, educational institution, or society." 42 U.S.C. § 2000e-1(a) (Title VII); *see also id.* § 12113(d)(1), (2) (similar language in the Americans with Disabilities Act). In *LeBoon v. Lancaster Jewish Community Center Ass'n*, 503 F.3d 217 (3d Cir. 2007), we examined whether a Jewish community center qualified as a "religious organization" for purposes of Title VII to determine whether it was exempt from compliance

reason to suppose that the Free Exercise guarantee is as limited as the government claims or the Majority accepts. Our Constitution recognizes the free exercise of religion as something in addition to other kinds of expression, not because it requires less deference, but arguably because it requires more. At the very least, it stands on an equal footing with the other protections of the First Amendment. *See Prince v. Massachusetts*, 321 U.S. 158, 164 (1944) ("[I]t may be doubted that any of the great

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with the religious discrimination provisions of Title VII's Section 702. Under a multi-factor test, we determined that the community center qualified as a "religious corporation, organization, or institution," because (1) "religious organizations may engage in secular activities without forfeiting protection under Section 702"; (2) "religious organizations need not adhere absolutely to the strictest tenets of their faiths to qualify for Section 702 protection"; (3) "religious organizations may declare their intention not to discriminate ... without losing the protection of Section 702"; and (4) "the organization need not enforce an across-the board policy of hiring only coreligionists." *Id.* at 229-30.

In contrast to that rather broad view of whether an organization qualifies for a religious exemption under Title VII, the definition of the term "religious employer" in the Mandate was notably cramped. *See* 45 C.F.R. § 147.130(a)(1)(iv)(B) (defining "religious employers" as "organization[s] that meet[] all of the following criteria: (1) The inculcation of religious values is the purpose of the organization. (2) The organization primarily employs persons who share the religious tenets of the organization. (3) The organization serves primarily persons who share the religious tenets of the organization. (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended."). HHS recently promulgated a new rule which purports to broaden the definition of "religious employer" to some extent. *See* 78 F.R. 39870-01.

liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme. All are interwoven there together."); *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) ("[T]he people of this nation have ordained in the light of history, that ... these liberties [religious faith and political belief] are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy. The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed."). The values protected by the religious freedom clauses of the First Amendment "have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance." *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

In spite of that history of zealous protection, the Majority relegates religious liberty to second-class status, saying that, because Supreme Court case law incorporated the Free Exercise and Free Speech Clauses into the Fourteenth Amendment's Due Process clause at different times, "it does not automatically follow that all clauses of the First Amendment must be interpreted identically." (Maj. Op. at 24.) Implicit in the Majority's position is that the Free Exercise Clause may be afforded less protection than the Free Speech Clause, and that is indeed the effect of the Majority's ruling. I wholeheartedly disagree with that inversion of the special solicitude historically shown for the free exercise of religion. And to any who might try to

obfuscate what has happened today by saying, "different doesn't mean worse," please note: courts in this Circuit and elsewhere have never questioned the First Amendment rights of corporations advancing abortion rights, *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 705-06 (3d Cir. 1991) (considering whether a statute requiring physicians to disclose certain information to women seeking abortions violated the First Amendment rights of Planned Parenthood, a corporation), *rev'd in part on other grounds*, 505 U.S. 833 (1992); *Planned Parenthood Ass'n of Hidalgo Cnty. Tex., Inc. v. Suehs*, 692 F.3d 343, 349 (5th Cir. 2012) (considering whether a state "restriction on promoting elective abortions" violated Planned Parenthood's First Amendment rights), while today's ruling denies First Amendment protection to one opposed to abortifacients, because that opposition is grounded in religious conviction.

Given the special place the First Amendment plays in our free society, the Supreme Court in *Bellotti* instructed that, instead of focusing on "whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons," "the question must be whether" the activity at issue falls within an area "the First Amendment was meant to protect." 435 U.S. at 776. In other words, the operative question under the First Amendment is what is being done – whether there is an infringement on speech or the exercise of religion – not on who is speaking or exercising religion. Hence, in the political speech context that it then faced, the *Bellotti* Court

emphasized that, "[i]f the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." *Id.* at 777. Likewise here, the right to object on religious grounds to funding someone else's reproductive choices is no less legitimate because the objector is a corporation rather than an individual.

But even if it were appropriate to ignore the Supreme Court's advice and focus on the person asserting the right rather than on the right at stake, there is a blindness to the idea that an organization like a closely held corporation is something other than the united voices of its individual members. The Majority detects no irony in its adoption of the District Court's comment that "'[r]eligious belief takes shape within the minds and hearts of individuals, and its protection is one of the more uniquely human rights provided by the Constitution'" (Maj. Op. at 20-21 (quoting *Conestoga Wood Specialties Corp.*, 213 WL 140110, at *7)), while it is simultaneously denying religious liberty to Conestoga, an entity that is nothing more than the common vision of five individuals from one family who are of one heart and mind about their religious belief.[17] Acknowledging "the Hahns' commitment to the Mennonite faith" (*id.* at 30), on

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[17] We are dealing here with a closely held corporation, and we need not determine whether or how a publicly traded corporation, with widely distributed ownership, might endeavor to exercise religion. Those issues can be left for another day.

one hand, while on the other acting as if the Hahns do not even exist and are not having their "uniquely human rights" trampled on is more than a little jarring.

And what is the rationale for this "I can't see you" analysis? It is that for-profit corporations like Conestoga were "created to make money." (*Id.* at 21.) It is the profit-making character of the corporation, not the corporate form itself, that the Majority treats as decisively disqualifying Conestoga from seeking the protections of the First Amendment or RFRA. (*See id.* at 22 ("We will not draw the conclusion that, just because courts have recognized the free exercise rights of churches and other religious entities, it necessarily follows that for-profit, secular corporations can exercise religion.").) That argument treats the line between profit-motivated and non-profit entities as much brighter than it actually is, since for-profit corporations pursue non-profit goals on a regular basis.[18] More important for present

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[18] It is commonplace for corporations to have mission statements and credos that go beyond profit maximization. When people speak of "good corporate citizens" they are typically referring to community support and involvement, among other things. Beyond that, recent developments in corporate law regarding "Benefit" or "B" corporations significantly undermine the narrow view that all for-profit corporations are concerned with profit maximization alone. As one academic has said, "[o]n a secular level, society appears to have already recognized this, giving form to the yearning of investors, customers, employees, and officers to combine and form businesses consistent with their particular values and convictions. This is evidenced by developments both in the marketplace and in state legislatures, such as the promulgation of 'Benefit Corporation' statutes and the 'B

purposes, however, the kind of distinction the majority draws between for-profit corporations and non-profit corporations has been considered and expressly rejected in other First Amendment cases.

In *Citizens United v. Federal Election Commission*, for example, the Supreme Court said, "[b]y suppressing the speech of manifold

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Corporation' movement." Ronald J. Colombo, *The Naked Private Square* at 57-58, 51 Houston L. Rev. (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2173801 &download=yes; *see also* Margaret Blair, *The Four Functions of Corporate Personhood* at 31, Public Law & Legal Theory, Working Paper No. 12-15, *available at* http://ssrn.com/abstract=2037356 (noting that corporations "support the building, preserving, and sustaining of *human institutions*. ... [L]arge corporations nearly always have broader purposes than just the enrichment of shareholders, purposes such as providing safe and reliable products, good jobs for employees, new treatments for diseases, investment options for small investors, financing for housing or college, or access to communication networks that link individuals around the globe, make vast amounts of information available to them, and give them an outlet for self-expression. While investors in these institutions expect, and deserve, to get a return on their investment, profits for shareholders are clearly not the only value being created by such enterprises."); Christopher Lacovara, *Strange Creatures: A Hybrid Approach to Fiduciary Duty in Benefit Corporations*, 2011 Colum. Bus. L. Rev. 815 (discussing "[b]enefit corporations, or 'B-Corps,' [which] represent a new corporate legal form designed to accommodate the dual profit-making and public benefit goals of the social enterprise movement"). There is absolutely no evidence that Conestoga exists solely to make money. It is operated, rather, to accomplish the specific vision of its deeply religious owners. While making money is part of that vision, the government has effectively conceded that Conestoga has more than profit on its corporate agenda.

corporations, *both for-profit and nonprofit*, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests." 558 U.S. at 354 (emphasis added); *see also Perry v. Los Angeles Police Dep't*, 121 F.3d 1365, 1371 (9th Cir. 1997) ("Once it is decided that the activity here is expressive activity, fully protected by the First Amendment, the fact that plaintiffs are not nonprofit organizations does not affect the level of protection accorded to their speech."); *Transp. Alts., Inc. v. City of New York*, 218 F. Supp. 2d 423, 444 (S.D.N.Y. 2002) ("[D]rawing distinctions between organizations based on for-profit or non-profit sponsorship in determining how much to charge to hold an event [in a public park] runs afoul of the First Amendment."). Because the First Amendment protects speech and religious activity generally, an entity's profit-seeking motive is not sufficient to defeat its speech or free exercise claims. *See Hobby Lobby*, 2013 WL 3216103, at *15 ("We see no reason the Supreme Court would recognize constitutional protection for a corporation's political expression but not its religious expression.").

The forceful dissent of Judge John T. Noonan, Jr., in *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988), put the point plainly:

> The First Amendment, guaranteeing the free exercise of religion to every person within the nation, is a guarantee that [for-profit corporations may] rightly invoke[]. Nothing in the broad sweep of the amendment puts

> corporations outside its scope. Repeatedly and successfully, corporations have appealed to the protection the Religious Clauses afford or authorize. Just as a corporation enjoys the right of free speech guaranteed by the First Amendment, so a corporation enjoys the right guaranteed by the First Amendment to exercise religion.

The First Amendment does not say that only one kind of corporation enjoys this right. The First Amendment does not say that only religious corporations or only not-for-profit corporations are protected. The First Amendment does not authorize Congress to pick and choose the persons or the entities or the organizational forms that are free to exercise their religion. All persons – and under our Constitution all corporations are persons – are free. A statute cannot subtract from their freedom.

Id. at 623 (Noonan, J., dissenting) (internal citation omitted).

Oddly, the government's opposing view, adopted by the Majority, appears to be itself a species of religion, based on the idea that seeking after filthy lucre is sin enough to deprive one of constitutional protection, and taking "[t]he theological position ... that human beings should worship God on Sundays or some other chosen day and go about their business without reference to God the rest of the time." *Id.* at 625. There is certainly in the text of the Constitution no support for this peculiar doctrine, and what precedent there is on the role of religion in

the world of commerce is to the contrary. *See United States v. Lee*, 455 U.S. 252, 254 (1982) (allowing Amish business owner to raise a free exercise defense to his alleged failure to pay social security taxes for his employees); *Braunfeld v. Brown*, 366 U.S. 599, 601 (1961) (allowing Jewish "merchants" in Philadelphia to challenge the city's Sunday-closing laws because the laws allegedly infringed on their free exercise of religion). As the Tenth Circuit sitting en banc noted in *Hobby Lobby*, the Supreme Court's decisions establish that Free Exercise rights do not evaporate when one is involved in a for-profit business. *Hobby Lobby*, 2013 WL 3216103, at *14 (citing *Lee* and *Braunfeld*).[19]

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[19] The government emphasizes that, in *Amos*, "the Supreme Court held that a gymnasium run by the Mormon Church was free to discharge a building engineer who failed to observe the Church's standards," but that, in so doing, "the Court stressed that the Church did not operate the gym on a for-profit basis." (Appellee's Br. at 18.) During oral argument, counsel for the government relied on that characterization of *Amos* to imply for the first time that granting any free exercise rights to a for-profit corporation would inevitably trigger Establishment Clause problems, as any accommodation to the corporation would come at the expense of similarly situated corporations that had not received a religious exemption. As I have already noted, *see supra* Part III.A.1, *Amos* did not turn on a for-profit versus non-profit distinction, and, in fact, the Court left open any question regarding the Establishment Clause impact of granting a religious exemption to a for-profit corporation. More fundamentally, the government mistakes the scope of the Establishment Clause. Under the so-called "endorsement" test for evaluating Establishment Clause challenges, courts look to "whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989). "Of course, the word 'endorsement' is not self-defining," *id.* at 593, but the Supreme

So, to recap, it is not the corporate form itself that can justify discriminating against Conestoga,

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Court "has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause," *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987); *see also Lee v. Weisman*, 505 U.S. 577, 627-28 (Souter, J., concurring) (arguing that government "may 'accommodate' the free exercise of religion by relieving people from generally applicable rules that interfere with their religious callings," without "necessarily signify[ing] an official endorsement of religious observance over disbelief"). Otherwise, the enforcement of laws that "cut[] across religious sensibilities, as [they] often do[]," would "put[] those affected to the choice of taking sides between God and government," *id.*, a choice that will often place a substantial burden on religious devotion, *see infra* Part III.A.2.a. "In such circumstances, accommodating religion reveals nothing beyond a recognition that general rules can unnecessarily offend the religious conscience when they offend the conscience of secular society not at all." *Weisman*, 505 U.S. at 628. If the Supreme Court were of a contrary mind, then *Amos*, *Yoder*, *Sherbert*, and a host of other cases in which the Court granted exemptions under the Free Exercise Clause would have been decided differently. Thus, it cannot be, as the government seems to suggest, that a decision to accommodate the Hahns' and Conestoga's constitutionally protected religious liberties would result in an impermissible endorsement of their religion. The Establishment Clause does not prohibit what the Free Exercise Clause demands. To be sure, the government may, under certain circumstances, "cross[] the line from permissible accommodation to unconstitutional establishment." *Id.* at 629 (concurring in majority holding that school-mandated prayer at graduation ceremony violated the Establishment Clause). But granting an exemption to Conestoga and the Hahns in this case would do nothing more than "lift a discernible burden on the[ir] free exercise of religion," *id.*, and "Government efforts to accommodate religion are permissible when they remove burdens on the free exercise of religion," *Cnty. of Allegheny*, 492 U.S. at 601 n.51.

and it is not the pursuit of profits that can justify it. Yet somehow, by the miracle-math employed by HHS and its lawyers, those two negatives add up to a positive right in the government to discriminate against a for-profit corporation. Thus, despite the Supreme Court's insistence that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein," *W. Va. Bd. Of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), the government claims the right to force Conestoga and its owners to facilitate the purchase and use of contraceptive drugs and devices, including abortifacients, all the while telling them that they do not even have a basis to speak up in opposition.[20] Remarkable.

I reject that power grab and would hold that Conestoga may invoke the right to religious liberty on its own behalf.[21]

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[20] Conestoga is silenced because it is a for-profit corporation, and the Hahns must likewise sit down and be quiet because, by the government's reasoning, the Mandate really does not affect them. (*See* Appellee's Br. at 22 (arguing that "[t]he contraceptive-coverage requirement does not compel the [Hahns] as individuals to do anything," but, rather, "[i]t is only the legally separate corporation that has any obligation under the mandate" (internal quotation marks omitted) (third alteration in original)).)

[21] Because of that conclusion, I need not consider at length the alternative argument that, even if Conestoga itself is without First Amendment protection, it may assert the free exercise claims of its owners, the Hahns. Suffice it to say that there is persuasive precedent for that approach in the context of close corporations. *See Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 200 (2d Cir. 2012) (allowing a kosher deli

to press Free Exercise and Establishment Clause claims on behalf of its owners); *Stormans Inc. v. Selecky*, 586 F.3d 1109, 1120 & 1120 n.9 (9th Cir. 2009) ("We have held that a corporation has standing to assert the free exercise right of its owners. ... [A]n organization that asserts the free exercise rights of its owners need not be primarily religious ... ."); *Townley*, 859 F.2d at 620 n.15 (holding that "it is unnecessary to address the abstract issue whether a for profit corporation has rights under the Free Exercise Clause independent of those of its shareholders and officers" because the corporation in question "presents no rights of its own different from or greater than its owners' rights," and allowing the corporation "standing to assert [its owners'] Free Exercise rights"); *Tyndale House Publishers, Inc. v. Sebelius*, 504 F. Supp. 2d 106, 116 (D.D.C. 2012) ("[T]he beliefs of Tyndale and its owners are indistinguishable."); *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 988 (E.D. Mich. 2012) ("For the purposes of the pending motion, however, Weingartz Supply Co. may exercise standing in order to assert the free exercise rights of its president, Daniel Weingartz, being identified as 'his company.'"); *State ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 850-51 (Minn. 1985) (holding that a "conclusory assertion that a corporation has no constitutional right to free exercise of religion is unsupported," and allowing a free exercise claim because the corporation's owners "are the ones asserting the first amendment right to the free exercise of religion").

The Majority forecloses that line of argument, insisting that, although "[t]he corporate form offers several advantages 'not the least of which was limitation of liability,' ... the shareholder must give up some prerogatives" in return (Maj. Op. at 27), including, apparently, his religious convictions. That conclusion rests on a mistaken idea that the business purposes for which corporate law has developed and that underpin the legal fiction of a corporation being separate from its owners must mean that the people behind the corporate veil are to be ignored for all purposes. That notion breezes past the very specific business objectives for which the corporate veil exists, namely, "to facilitate aggregations of capital," *Entel v. Guilden*, 223 F. Supp. 129, 131 (S.D.N.Y. 1963), and "to limit or eliminate the personal liability of corporate principals,"

2. The Appellants' RFRA Claim

Turning to the merits of the Appellants' RFRA claim, I am satisfied that both Conestoga and the Hahns have shown a likelihood of success. RFRA has been called the "most important congressional action with respect to religion since the First Congress proposed the First Amendment," Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 243 (1994), and it exists specifically to provide heightened protection to the free exercise of religion. The statute was produced by an "extraordinary ecumenical coalition in the Congress of liberals and conservatives, Republicans and Democrats, Northerners and Southerners, and in the country as a whole, a very broad coalition of groups that have traditionally defended ... the various religious faiths ... as well as those who champion the cause of civil liberties." *Religious Freedom Restoration Act of 1990: Hearing Before the Subcomm. On Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 101st Cong. 13 (1991) (statement of Rep. Solarz, chief sponsor of H.R. 5377).

Those diverse voices came together in response to the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon*

Goldman v. Chapman, 844 N.Y.S.2d 126, 127 (N.Y. App. Div. 2007). Nothing in the history of the important doctrine of a corporation's separate identity justifies the limitation on civil rights that the Majority endorses. *See Hobby Lobby*, 2013 WL 3216103, at *27 (Hartz, J., concurring) ("What does limiting financial risk have to do with choosing to live a religious life?").

v. Smith, 494 U.S. 872 (1990), in which, while upholding a law that banned the use of peyote even for sacramental purposes, the Court held that the First Amendment's Free Exercise Clause does not require judges to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws. *Id.* at 883-90. Congress quickly decried *Smith* as having "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4). The stringent standard of review imposed by RFRA on government action reflects Congress's judgment that "governments should not substantially burden religious exercise without compelling justification." *Id.* § 2000bb(a)(3). It is intended "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) ... in all cases where free exercise of religion is substantially burdened" by the Federal government, *id.* § 2000bb(b)(1),[22] and we are to look to pre-*Smith* free exercise jurisprudence in assessing RFRA claims, *see Vill. Of Bensenville v. FAA*, 457 F.3d 52, 62 (D.C. Cir. 2006).

In short, RFRA restores the judicial standard of review known as "strict scrutiny," which is "the most demanding test known to constitutional law." *City of*

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[22] Although the Supreme Court held RFRA unconstitutional as applied to state and local governments because it exceeded Congress" power under § 5 of the Fourteenth Amendment, *see City of Boerne v. Flores*, 521 U.S. 507 (1997), it "continues to apply to the Federal Government," *Sossamon v. Texas*, __ U.S. __, 131 S. Ct. 1651, 1656 (2011).

Boerne v. Flores, 521 U.S. 507, 534 (1997). The statute prohibits the Federal government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability,"[23] *id.* § 2000bb-1(a), except when the government can "demonstrat[e] that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest," *id.* §

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[23] Having determined (erroneously) that corporations, even closely held ones, do not enjoy religious liberty, the Majority declined to "decide whether such a corporation is a 'person' under the RFRA." (Maj. Op. at 28-29.) I believe that it is. Although the statute itself does not define "person," the fallback definition section in the United States Code provides that "unless the context indicates otherwise ... the word[] 'person' ... include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals ... ." 1 U.S.C. § 1; *see also Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1707 (2012) (explaining that the word "person" often includes corporations, and that Congress and the Supreme Court often use the word "individual" "to distinguish between a natural person and a corporation"); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 687 (1978) ("[B]y 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis."). Given that corporations can assert religious exercise claims, *see supra* Part III.A.1, the District Court erred in concluding that "context indicates" that a for-profit corporation is not a "person" for purposes of RFRA. *Conestoga Wood Specialties Corp.*, 2013 WL 140110, at *10. *See generally Hobby Lobby*, 2013 WL 3216103, at *12 ("[T]he government has given us no persuasive reason to think that Congress meant 'person' in RFRA to mean anything other than its default meaning in the Dictionary Act – which includes corporations regardless of their profit-making status.").

2000bb-1. The term "exercise of religion" "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5(7)(A), *incorporated by* 42 U.S.C. § 2000bb-2(4). A person whose religious practices are burdened in violation of RFRA "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief." *Id.* § 2000bb-1(c).

a. Substantial Burden

Under RFRA, "a rule imposes a substantial burden on the free exercise of religion if it prohibits a practice that is both sincerely held by and rooted in the religious beliefs of the party asserting the claim." *United States v. Ali*, 682 F.3d 705, 710 (8th Cir. 2012) (internal quotation marks omitted). Within the related context of the Religious Land Use and Institutionalized Persons Act of 2000, a "substantial burden" exists where: (1) "a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other [persons] versus abandoning one of the precepts of his religion in order to receive a benefit"; or (2) "the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs." *Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007).

The substantial burden test derives from the Supreme Court's decisions in *Sherbert* and *Yoder*. In *Sherbert*, the Court held that a state's denial of unemployment benefits to a Seventh-Day Adventist

for refusing to work on Saturdays substantially burdened the exercise of her religious belief against working on Saturdays. The state law at issue in that case

> force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Sherbert, 374 U.S. at 404. And in *Yoder* the Court held that a compulsory school attendance law substantially burdened the religious exercise of Amish parents who refused to send their children to high school. The burden in *Yoder* was a fine of between five and fifty dollars. The Court held that burden to be "not only severe, but inescapable," requiring the parents "to perform acts undeniably at odds with fundamental tenets of their religious belief." *Yoder*, 406 U.S. at 218.

The District Court here failed to appreciate the applicability of those precedents. It held, for two reasons, that the burden imposed by the Mandate on Conestoga and the Hahns was insubstantial. First, it said that Conestoga, as a for-profit corporation, lacks religious rights and so can suffer no burden on them, and, relatedly, that any harm to the Hahns' religious liberty is "too attenuated to be substantial" because

it is Conestoga, not they, that must face the Mandate. *Conestoga Wood Specialties Corp.*, 2013 WL 140110, at *12; *see also id.* at *14 ("Conestoga's corporate form ... separates the Hahns from the requirements of the ACA, as the Women's Preventive Healthcare regulations apply only to Conestoga, a secular corporation without free exercise rights, not the Hahns. Whatever burden the Hahns may feel from being involved with a for-profit corporation that provides health insurance that could possibly be used to pay for contraceptives, that burden is simply too indirect to be considered substantial under the RFRA."). That line of argument is fallacious, for the reasons I have just discussed and will not repeat. *See supra* Part III.A.1.

Relying on the recently reversed panel decision in *Hobby Lobby*, the District Court's second line of argument was that "the Hahns have not demonstrated that [the Mandate] constitute[s] a substantial burden upon their religion," *Conestoga Wood Specialties Corp.*, 2013 WL 140110, at *12, because "the ultimate and deeply private choice to use an abortifacient contraceptive rests not with the Hahns, but with Conestoga's employees," *id.* at *13. As the District Court saw it, "any burden imposed by the regulations is too attenuated to be considered substantial" because "[a] series of events must first occur before the actual use of an abortifacient would come into play," including that "the payment for insurance [must be made] to a group health insurance plan that will cover contraceptive services ...; the abortifacients must be made available to Conestoga employees through a pharmacy or other

healthcare facility; and a decision must be made by a Conestoga employee and her doctor, who may or may not choose to avail themselves to these services." *Id.* at *14. "Such an indirect and attenuated relationship," the Court held, "appears unlikely to establish the necessary substantial burden." *Id.* at *12 (quoting *Hobby Lobby*, No. 12-6294, slip op. at 7, *rev'd en banc*, __ F.3d __, 2013 WL 3216103 (10th Cir. 2013)) (internal quotation marks omitted).

The problem with that reasoning is that it fundamentally misapprehends the substance of the Hahns' claim. As the Seventh Circuit rightly pointed out when granting an injunction in the Mandate case before it, "[t]he religious-liberty violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services, *not* – or perhaps more precisely, *not only* – in the later purchase or use of contraception or related services." *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *3 (7th Cir. Dec. 28, 2012); *see also Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 123 (D.D.C. 2012) ("Because it is the coverage, not just the use, of the contraceptives at issue to which the plaintiffs object, it is irrelevant that the use of the contraceptives depends on the independent decisions of third parties."); *Grote Indus., LLC v. Sebelius*, __ F. Supp. 2d __, 2012 WL 6725905, at *6 (S.D. Ind. Dec. 27, 2012) ("We acknowledge that Plaintiffs object not just to the *use* of contraceptives, but to the *coverage* itself."). In requiring them to provide the offending insurance coverage, the Mandate requires the Hahns and Conestoga to take direct actions that violate the

tenets of their Mennonite faith, with the threat of severe penalties for non-compliance. They face the "inescapable choice" between facilitating the provision of "drugs and services that they believe are immoral (and thereby commit[ting] an immoral act)," or "suffer[ing] severe penalties for non-compliance with the Mandate." (Appellants' Opening Br. at 26-27.) As explained in *Sherbert* and *Yoder*, religious exercise is substantially burdened by a law that puts substantial pressure on a person to commit an act discouraged or forbidden by that person's faith, and the Hahns' Mennonite faith forbids them not only from using certain contraceptives, but from paying for others to use them as well. *Cf. United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 629 (7th Cir. 2000) ("The Free Exercise Clause ... provides considerable ... protection for the ability to practice (through the performance or non-performance of certain actions) one's religion.").

Even if Conestoga's and the Hahns' only religious objection were the ultimate use of the offending contraceptives by Conestoga employees, however, the fact that the final decision on use involves a series of sub-decisions does not render the burden on their religious exercise insubstantial. Nothing in RFRA suggests that indirect pressure cannot violate the statute. *See* 42 U.S.C. § 2000bb-1(a) (prohibiting not "direct" burdens, but "substantial" ones). Indeed, even though a burden may be characterized as "indirect," "the Supreme Court has indicated that indirectness is not a barrier to finding a substantial burden." *Tyndale*, 904 F. Supp. 2d at 123. The claimant in *Thomas v. Review*

Board of Indiana Employment Security Division, 450 U.S. 707 (1981), quit his job because, based on his religious beliefs, he could not work in a factory that produced tank turrets. The state denied him unemployment benefits and argued that his objection was unfounded because he had been willing to work in a different factory that produced materials that might be used for tanks. The Supreme Court held that, in determining whether Thomas's religious beliefs were burdened, it could not second-guess his judgment about what connection to armament production was unacceptably close for him: "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one." *Id.* at 715. "While the compulsion may be indirect," the Court reasoned, "the infringement upon free exercise is nonetheless substantial." *Id.* at 718. The Court further instructed that "[c]ourts should not undertake to dissect religious beliefs" when analyzing substantial burden questions. *Id.* at 715. The Appellants here are entitled, just as much as Thomas was, to make judgments about when their connection with the acquisition and use of contraceptives becomes close enough to contravene their faith.

Moreover, if the indirectness of the ultimate decision to use contraceptives truly rendered insubstantial the harm to an employer, then no exemptions to the Mandate would be necessary. The harm to the Catholic Church by one of its employees' decision to use an abortifacient would be equally as indirect, and, by the District Court's logic, would pose equally as insubstantial a burden on the

Church's free exercise rights. But the Mandate does provide an exemption for so-called "religious employers," *see supra* note 16, and the regulation itself thus allows that an employee's choice that only indirectly affects an employer can result in substantial harm to the employer.[24]

It is true, as the Supreme Court cautioned in *United States v. Lee*, that "every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." 455 U.S. at 261. But even in *Lee*, the Court held that the requirement to pay Social Security taxes substantially burdened a for-profit Amish employer's religious exercise.[25] The Court

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[24] The same logic applies to the District Court's statement that there is no difference to employers if, on one hand, their employees purchase contraceptives with salary or, on the other, they obtain them free of charge through company-provided health insurance. *Conestoga Wood Specialties Corp.*, 2013 WL 140110, at *13; *see also Autocam*, No. 1:12-cv-1096, slip op. at 11 (noting that plaintiffs will be "paying indirectly for the same services through wages" that their employees may choose to use "for contraception products and services"). If that were the case, no exemptions would be required, even for religious employers. In a free society, there is a world of difference between paying money with no strings attached as compensation for an employee's work and being forced to fund insurance coverage that expressly provides for goods and services believed to be morally reprehensible.

[25] The Supreme Court in *Lee* did not use the phrase

held that, "[b]ecause the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights." *Id.* at 257. Although the Court held that religious adherents who enter the commercial marketplace do not have an absolute right to receive a religious exemption from all legal requirements that conflict with their faith, *id.* at 261, the fact that the Court concluded that there was a substantial burden and proceeded to apply strict scrutiny illustrates that the government does not have *carte blanche* to substantially burden the religious exercise of for-profit corporations and their owners.

Thus, I would hold that the District Court erred in concluding that the Mandate does not substantially burden Conestoga's and the Hahns' free exercise of religion.

b. Strict Scrutiny

"substantial burden," but, since *Lee*, the Court has consistently described its holding in that case as establishing that the government may substantially burden religious exercise only if it can show that the regulation in question satisfies strict scrutiny – that is, that the regulation furthers a compelling governmental interest in the least restrictive means possible. In *Hernandez v. Commissioner*, 490 U.S. 680 (1989), for example, the Court described the holding in *Lee* in the following manner: "[O]ur decision in *Lee* establishes that *even a substantial burden* would be justified by the 'broad public interest in maintaining a sound tax system,' free of 'myriad exceptions flowing from a wide variety of religious beliefs.'" *Id.* at 699-700 (quoting *Lee*, 455 U.S. at 260) (emphasis added).

If government action "substantially burdens" religious exercise, it will be upheld under RFRA only if it "is in furtherance of a compelling governmental interest," and "is the least restrictive means" of accomplishing that interest. 42 U.S.C. § 2000bb-1. Neither the Majority nor the District Court addressed that strict scrutiny test, because they disposed of the case on other grounds. The Supreme Court has said that strict scrutiny must not be "'strict in theory, but fatal in fact.'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995). And it has recently noted that "the opposite is also true": "[s]trict scrutiny must not be strict in theory but feeble in fact." *Fisher v. Univ. of Texas at Austin*, slip op. at 13, 570 U.S. __ (2013). Only the feeblest application of strict scrutiny could result in upholding the Mandate on this record.

i. Compelling Interest

Compelling interests are those "of the highest order," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993), or "paramount interests," *Thomas v. Collins*, 323 U.S. 516, 530 (1945). The government maintains that the Mandate advances two compelling governmental interests: "public health and gender equality." (Appellee's Br. at 34.) In particular, it states that the "health services at issue here relate to an interest – a woman's control over her procreation – that is so compelling as to be constitutionally protected from state interference." (Appellee's Br. at 34-35.)

Preserving public health and ending gender

discrimination are indeed of tremendous societal significance. The government can certainly claim "a compelling interest in safeguarding the public health by regulating the health care and insurance markets." *Mead v. Holder*, 766 F. Supp. 2d 16, 43 (D.D.C. 2011). And, as it is of undoubted "importance, both to the individual and to society, [to] remov[e] the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women," *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984), there is a compelling interest in "[a]ssuring women equal access to ... goods, privileges, and advantages" enjoyed by men, *id.*

Assuming for the sake of discussion that the Mandate may actually advance those interests, it must nevertheless be observed that the mere "invocation" of a "general interest in promoting public health and safety [or, for that matter, gender equality] ... is not enough" under RFRA. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 438 (2006). The government must show that the application of the Mandate to the Hahns and Conestoga in particular furthers those compelling interests. 42 U.S.C. § 2000bb-1(b)(1); *see Tyndale*, 904 F. Supp. 2d at 125 (providing that the government "must show that requiring [appellants] to provide the contraceptives to which they object ... will further the government's compelling interests in promoting public health and in providing women equal access to health care"); *see also O Centro*, 546 U.S. at 430 ("RFRA requires the Government to demonstrate that the compelling interest test is

satisfied through application of the challenged law 'to the person' – the particular claimant whose sincere exercise of religion is being substantially burdened." (quoting 42 U.S.C. § 2000bb-1(b))). Courts are required to "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 431; *see also Yoder*, 406 U.S. at 236 ("[I]t was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish."). The government must "offer[] evidence that granting the requested religious accommodations would seriously compromise its ability to administer" its contraceptive Mandate. *O Centro*, 546 U.S. at 435. It has failed to do that.

The government's arguments against accommodating the Hahns and Conestoga are "undermined by the existence of numerous exemptions [it has already made] to the ... mandate." *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1297 (D. Colo. 2012). By its own choice, the government has exempted an enormous number of employers from the Mandate, including "religious employers" who appear to share the same religious objection as Conestoga and the Hahns, leaving tens of millions of employees and their families untouched by it.[26] "[A] law cannot be regarded as

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[26] The sheer number of employers exempted from the Mandate distinguishes this case from *United States v. Lee*. In that case,

protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye*, 508 U.S. at 547 (alteration and internal quotation marks omitted). So, when the government's proffered compelling interest applies equally to employers subject to a law and those exempt from it, "it is difficult to see how [the] same

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the Supreme Court held that, although the "compulsory participation in the social security system interfere[d] with [the plaintiff Amish employer's] free exercise rights," 455 U.S. at 257, the social security system nonetheless satisfied strict scrutiny as applied to the Amish employer, regardless of Congress's having exempted from social security taxes "self-employed members of other religious groups with similar beliefs," *id.* at 255 (citation omitted). As the Court described it, that provision exempted only a "narrow category" of "[s]elf-employed persons" who are members of "a religious community" that, like the Amish, "ha[s] its own 'welfare' system," *id.* at 261, a small group to say the least.

By way of comparison, the Supreme Court held in *O Centro* that the government had failed to make a showing that a ban on the use of a hallucinogenic substance served a compelling interest as applied to a Native American tribe that used the substance as part of its religious services. 546 U.S. at 439. The Court relied heavily on similar religious exemptions granted with respect to the use of peyote by "hundreds of thousands" of members of the Native American Church, and found that such broad exemptions weighed heavily against finding a compelling interest. *Id.* at 433-34. With respect to the Mandate, as a result of the multiple and wide-reaching exemptions, millions of individuals – perhaps upwards of 190 million, *see Newland*, 881 F. Supp. 2d at 1298 ("The government has exempted over 190 million health plan participants ... from the preventive care coverage mandate.") – will fall outside the government's interest in increasing access to contraceptives. This case is thus even further removed than *O Centro* from the narrow exemption involved in *Lee*.

findings [supporting the government's interest] alone can preclude any consideration of a similar exception" for a similarly situated plaintiff. *O Centro*, 546 U.S. at 433; *see also Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (noting that the purpose of a law is undermined when it is "so woefully underinclusive as to render belief in [its] purpose a challenge to the credulous"). The Mandate is a classic example of such arbitrary underinclusiveness. It cannot legitimately be said to vindicate a compelling governmental interest because the government has already exempted from its reach grandfathered plans, employers with under 50 employees, and what it defines as "religious employers" (*see* Maj. Op. at 12 n.4), thus voluntarily allowing millions upon millions of people – by some estimates 190 million – to be covered by insurance plans that do not satisfy the supposedly vital interest of providing the public with free contraceptives. *See Geneva Coll. v. Sebelius*, No. 12-cv-00207, 2013 WL 3071481, at *10 (W.D. Pa. June 18, 2013) ("In light of the myriad exemptions to the mandate's requirements already granted, the requirement is woefully underinclusive and therefore does not serve a compelling government interest." (internal quotation marks omitted)).

ii. Least Restrictive Means

Nor can the government affirmatively establish that the Mandate is the least restrictive means of advancing its interests in health and gender equality. Statutes fail the "least restrictive means" test when they are "overbroad" or "underinclusive."

Church of the Lukumi Babalu Aye, 508 U.S. at 546. The underinclusiveness here is manifest, as just described. Moreover, the least restrictive means test is aimed at uncovering "the extent to which accommodation of the [plaintiff] would impede the state's objectives," and "[w]hether the state has made this showing depends on a comparison of the cost to the government of altering its activity to allow the religious practice to continue unimpeded versus the cost to the religious interest imposed by the government activity." *S. Ridge Baptist Church v. Indus. Comm'n*, 911 F.2d 1203, 1206 (6th Cir. 1990) (internal quotation marks omitted). If the government "has open to it a less drastic way of satisfying its legitimate interests, it may not choose a [regulatory] scheme that broadly stifles the exercise of fundamental personal liberties." *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983) (internal quotation marks omitted).

The Hahns and Conestoga argue that the government could directly further its interest in providing greater access to contraception without violating their religious exercise by, for example,

> (1) offer[ing] tax deductions or credits for the purchase of contraceptive services; (2) expand[ing] eligibility for already existing federal programs that provide free contraception; (3) allow[ing] citizens who pay to use contraceptives to submit receipts to the government for reimbursement; or (4) provid[ing] incentives for pharmaceutical companies that manufacture contraceptives

> to provide such products to pharmacies, doctor's offices, and health clinics free of charge.

(Appellants' Opening Br. at 51.) In response, the government argues that the Appellants misunderstand the least-restrictivemeans test and that their proposed alternatives "would require federal taxpayers to pay the cost of contraceptive services for the employees of for-profit, secular companies." (Appellees' Br. at 40.)

It is the government that evidently misunderstands the test, for while the government need not address every conceivable alternative, it "must refute the alternative schemes offered by the challenger," *United States v. Wilgus*, 638 F.3d 1274, 1288-89 (10th Cir. 2011),[27] ultimately settling on a policy that is "necessary" to achieving its compelling goals, *Fisher*, slip op. at 10, 570 U.S. __. And it must seek out religiously neutral alternatives before choosing policies that impinge on religious liberty. *Cf. Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002) ("The Government simply has not provided sufficient justification here. If the First Amendment means anything, it means that regulating speech must be a last – not first – resort. Yet here it seems to have been the first strategy the

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[27] As the Tenth Circuit said in *Wilgus*, the government need not "refute each and every conceivable alternative regulation scheme." *Wilgus*, 638 F.3d at 1289. But it "must support its choice of regulation, and it must refute the alternative schemes offered by the challenger" – "both through the evidence presented in the record." *Id.*

Government thought to try."). In those responsibilities, the government has utterly failed. It has made no showing that any of the Appellants' alternative ideas would be unworkable. *Cf. Fisher*, slip op. at 11, 570 U.S. __ (stating, in the context of racial preferences, that "[t]he reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the ... benefits" sought). In fact, the government already provides free contraception to some women, and there has been no showing that increasing the distribution of it would not achieve the government's goals. Because the government has not refuted that it could satisfy its interests in the wider distribution of contraception through any or all of the means suggested by Conestoga and the Hahns, without burdening their rights to religious liberty, the government has not shown that the Mandate is the least restrictive means of addressing those interests. It may be that the government's political interests are better satisfied by forcing the Hahns to the pharmacy counter than by trying to persuade voters to support other means to fund free contraceptives, but political expediency is not synonymous with "least restrictive means."

Accordingly, the government has not met the burdens of strict scrutiny, and I would hold that Conestoga and the Hahns have established a likelihood of succeeding on the merits of their RFRA claim.

3. The Appellants' First Amendment Claim

Conestoga and the Hahns also bring a separate claim under the First Amendment. As previously discussed, the Supreme Court in *Smith* held that the Free Exercise Clause is not implicated when the government burdens a person's religious exercise through laws that are neutral and generally applicable. 494 U.S. at 879. In contrast, "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Church of the Lukumi Babalu Aye*, 508 U.S. at 546. "Neutrality and general applicability are interrelated, and ... failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* at 531.

In my view, the Mandate is not generally applicable, and it is not neutral. "A law fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated." *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004). Here, as already noted, the government has provided numerous exemptions, large categories of which are unrelated to religious objections, namely, the exemption for grandfathered plans and the exemption for employers with less than 50 employees. And it seems less than neutral to say that some religiously motivated employers – the ones picked by the

government – are exempt while others are not.[28] Finally, it is utterly arbitrary to say that religious liberties depend on whether a company hires 49 or 50 employees.

Under the First Amendment, therefore, the Mandate is to be subjected to strict scrutiny. As discussed above in relation to the RFRA claim brought by Conestoga and the Hahns, *see supra* Part III.A.2.b, the Mandate does not pass that daunting test, and, accordingly, they have demonstrated a reasonable likelihood of succeeding on their First Amendment claim.

B. Irreparable Harm

Focusing only on the question of likelihood of success on the merits, neither the District Court nor the Majority evaluated whether Conestoga and the Hahns have demonstrated irreparable harm. It is a painful topic to confront, as it brings to the fore the immediate and unconscionable consequences of the government's overreaching.

"Irreparable harm is injury for which a monetary award cannot be adequate compensation." *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 71 (2d Cir. 1996) (internal quotation marks omitted). "It is well-established that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Hohe*

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[28] Because I have already discussed the "non-profit versus for-profit" distinction at length, *see supra* Part III.A.1, I will not repeat my reasons for rejecting it in this context.

v. Casey, 868 F.2d 69, 72 (3d Cir. 1989) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)) (alteration in original). In fact, "[w]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1 (2d ed. 1995). That principle applies with equal force to a violation of RFRA because RFRA enforces First Amendment freedoms. *See Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) ("[C]ourts have held that a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA."); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) ("Courts have persuasively found that irreparable harm accompanies a substantial burden on an individual's rights to the free exercise of religion under RFRA." (citations omitted)). Threats to First Amendment rights are often seen as so potentially harmful that they justify a lower threshold of proof to show a likelihood of success on the merits. *Playboy Entm't Grp., Inc. v. United States*, 945 F. Supp. 772, 783 (D. Del. 1996) ("In a case ... in which the alleged injury is a threat to First Amendment interests, the finding of irreparable injury is often tied to the likelihood of success on the merits."), *aff'd*, 520 U.S. 1141 (1997).

Because the government demanded that the Hahns and Conestoga capitulate before their appeal was even heard,[29] and because the District Court

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[29] Given the government's recent decision to delay the implementation of other aspects of the ACA, *see* Zachary A. Goldfarb & Sandhya Somashekhar, *White House Delays*

denied preliminary injunctive relief, the severe hardship has begun. (*See* Maj. Op. at 13 (noting that "Conestoga is currently complying with the Mandate").) Faced with ruinous fines, the Hahns and Conestoga are being forced to pay for the offending contraceptives, including abortifacients, in violation of their religious convictions, and every day that passes under those conditions is a day in which irreparable harm is inflicted. *See Elrod*, 427 U.S. at 373 ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). The Majority's ruling guarantees that grievous harm will go on and, as the days pile up, worsen. *See Conestoga Wood Specialties Corp. v. U.S. Dep't of Health & Human Servs.*, No. 13-1144, 2013 WL 1277419, at *6-*11 (3d Cir. Jan. 29, 2013) (Jordan, J.,dissenting).

C. The Remaining Injunction Factors

Conestoga and the Hahns have also met the remaining preliminary injunction factors. A preliminary injunction would not result in greater harm to the government but would merely restore the status quo between the parties. "One of the goals of the preliminary injunction analysis is to maintain that status quo, defined as the last, peaceable,

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Health-Care Rule that Businesses Provide Insurance to Workers, Washington Post, July 2, 2013, *available at* http://www.washingtonpost.com/politics/white-house-delays-health-care-rule-that-businesses-provide-insurance-to-workers/2013/07/02/f87e7892-e360-11e2aef3339619eab080_story.html, one wonders why it could not give religious believers some breathing room during court consideration of the Mandate.

noncontested status of the parties." *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004) (alteration and internal quotation marks omitted). The last uncontested status between the parties was prior to January 1, 2013, the date the Mandate became effective against the Appellants. "Granting an injunction would restore that state of affairs." *Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 197 (3d Cir. 1990). Moreover, the harm to Conestoga and the Hahns caused by the denial of the preliminary injunction vastly outweighs the harm to the government were an injunction to be granted. Again, any infringement on a person's First Amendment rights – even if only for a short time – constitutes irreparable injury. *See Elrod*, 427 U.S. at 373. Although a preliminary injunction in this case might "temporarily interfere[] with the government's goal of increasing cost-free access to contraception and sterilization," that interest "is outweighed by the harm to the substantial religious-liberty interests on the other side." *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *5 (7th Cir. Dec. 28, 2013); *see also Monaghan v. Sebelius*, __ F. Supp. 2d __, 2012 WL 6738476, at *8 (E.D. Mich. Dec. 30, 2012) ("The harm of delaying the implementation of a statute that may later be deemed constitutional is outweighed by the risk of substantially burdening the free exercise of religion.").

In addition, a preliminary injunction would not harm the public interest. On the contrary, "[a]s a practical matter, if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the

public interest will favor the plaintiff." *Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 n.8 (3d Cir. 1994). And "[t]he public as a whole has a significant interest in ensuring ... [the] protection of First Amendment liberties." *Jones v. Caruso*, 569 F.3d 258, 278 (6th Cir. 2009). An injunction would simply put Conestoga's employees in the same position as the tens of millions of employees and their families whose employers have already been exempted from the Mandate.

IV. Conclusion

This is a controversial and, in some ways, complex case, but in the final analysis it should not be hard for us to join the many courts across the country that have looked at the Mandate and its implementation and concluded that the government should be enjoined from telling sincere believers in the sanctity of life to put their consciences aside and support other people's reproductive choices. The District Court's ruling should be reversed and a preliminary injunction should issue.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CONESTOGA WOOD SPECIALTIES CORPORATION, et al.	:	**CIVIL ACTION**
v.	:	
KATHLEEN SEBELIUS, et al.	:	**No. 12-6744**

Goldberg, J. **January 11, 2013**

MEMORANDUM OPINION

This case presents issues of first impression as to whether the Women's Preventive Healthcare regulations under the recently enacted Patient Protection and Affordable Care Act pass muster under the First Amendment and the Religious Freedom Restoration Act of 1993. In resolving these questions we also decide whether the United States Supreme Court's decision in Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010), which granted political free speech rights to corporations, also extends to the First Amendment's Free Exercise of Religion Clause.

Plaintiffs, Conestoga Wood Specialties

Corporation, and five of its owners, Norman Hahn, Elizabeth Hahn, Norman Lemar Hahn, Anthony H. Hahn and Kevin Hahn, brought suit against Kathleen Sebelius in her official capacity as Secretary of the United States Department of Health and Human Services, along with other United States government officials and agencies,[1] seeking declaratory and injunctive relief. Plaintiffs allege that various regulations and guidelines implemented in connection with the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, violate the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, et seq., the First and Fifth Amendments to the United States Constitution and the Administrative Procedure Act, 5 U.S.C. § 701, et seq. Specifically, Plaintiffs object to regulations regarding Women's Preventive Healthcare—which Plaintiffs refer to as "the Mandate"— that allegedly "force [them] to pay for and otherwise facilitate the insurance coverage and use of contraception with an abortifacient effect and related education and counseling." Plaintiffs claim that these regulations conflict with their sincerely-held religious beliefs. (Am. Compl. ¶¶ 2, 4.)

Plaintiffs filed a motion for preliminary

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[1] The complete list of Defendants is as follows: Kathleen Sebelius, in her official capacity as Secretary of the United States Department of Health and Human Services; Hilda Solis, in her official capacity as Secretary of the United States Department of Labor; Timothy Geithner, in his official capacity as Secretary of the United States Department of the Treasury; United States Department of Health and Human Services; United States Department of Labor; and United States Department of the Treasury.

injunction on December 7, 2012, and the Court held an evidentiary hearing on January 4, 2013.[2] We have also accepted and considered an amicus brief from the American Civil Liberties Union Foundation and the American Civil Liberties Union of Pennsylvania.

For the reasons that follow, we find that Plaintiffs have not shown that they are entitled to a preliminary injunction, and, as such, the motion will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND[3]

A. The Affordable Care Act

The Patient Protection and Affordable Care Act ("ACA"), which was signed into law on March 23, 2010, requires employers with fifty or more full-time employees to provide their employees with a minimum level of health insurance. One aspect of this minimum level of coverage is that employers and health insurance companies are required to cover women's "preventive health services," and are prohibited from imposing cost-sharing for plan beneficiaries. 42 U.S.C. § 300gg-13(a)(4).

The Health Resources and Services

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[2] On December 28, 2012, we entered an Order for a temporary stay pending an evidentiary hearing. (Doc. No. 35.) Absent this temporary stay, Conestoga would have been required to comply with the regulations on January 1, 2013.

[3] All facts are undisputed, unless otherwise noted.

Administration ("HRSA") delegated the creation of guidelines on this issue to the Institute of Medicine ("IOM"). See 77 FR 8725-01 (Feb. 15, 2012). On August 1, 2011, the HRSA adopted the recommended guidelines published by the IOM, which included required coverage for "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." INSTITUTE OF MEDICINE, CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 109-10 (2011) (hereinafter "CLOSING THE GAPS"); see also 76 Fed. Reg. 46621-01 (Aug. 3, 2011).

Under the regulations adopted pursuant to Women's Preventive Healthcare, group health plans and health insurance issuers are required to provide coverage consistent with the HRSA guidelines in plan years beginning on or after August 1, 2012, unless the employer or plan is exempt. *Women's Preventive Services: Required Health Plan Coverage Guidelines*, U.S. DEPT. OF HEALTH AND HUMAN SVCS., http://www.hrsa.gov/womensguidelines/ (last visited Jan. 8, 2013) ("HRSA Guidelines"). The interim final regulations and guidelines were adopted without change on April 16, 2012. 77 FR 8725-01 (Feb. 15, 2012).

Congress required coverage of Women's Preventive Healthcare in order to address inequities in the current healthcare system, which leads "women of childbearing age [to] spend 68 percent more in out-of-pocket health care costs than men."

155 Cong. Rec. at S12027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand). Studies have found "more than half of women delay[ ] or avoid[ ] preventive care because of its cost," id. at S12028, and that unplanned pregnancies have a higher rate of health risks for both mother and child than planned pregnancies. CLOSING THE GAPS, supra, at 103.

If an employer fails to comply with these regulations, it faces staunch penalties. Non-exempt employers who choose to exclude health coverage for abortifacient contraception face a penalty of $100 each day per offending employee. 26 U.S.C. § 4980D(b)(1). If an employer fails to provide health insurance altogether, it faces an annual penalty for each employee. See 26 U.S.C. § 4980H. Additionally, the Department of Labor and plan participants may bring suit against an employer that fails to comply with the regulations. 29 U.S.C. § 1132.

The Women's Preventive Healthcare regulations contain numerous exemptions for specific subsets of employers. One such exemption is for "grandfathered" plans—"coverage provided by a group health plan . . . in which an individual was enrolled as of March 23, 2010," the date on which the ACA was enacted. 45 C.F.R. § 147.140(a). An exemption with regard to women's contraception also exists for certain "religious employers." A religious employer is defined as an organization meeting all of the following requirements:

(1) The inculcation of religious values is the

> purpose of the organization.
> (2) The organization primarily employs the religious tenets of the organization.
> (3) The organization serves primarily persons who share the religious tenets of the organization.
> (4) The organization is a nonprofit organization ... .

45 C.F.R. § 147.130(a)(1)(iv)(B); 77 FR 8725-01 (Feb. 15, 2012). Finally, employers with fewer than fifty full-time employees are required to provide coverage for Women's Preventative Healthcare within any health plan provided to employees, but are permitted to entirely forego providing insurance without penalty. 26 U.S.C. § 4980H(c)(2)(A).

Upon receiving feedback from organizations that objected to contraception coverage on religious grounds but also did not fit under the definition of "religious employer," the Department of the Treasury, Department of Labor and Department of Health and Human Services released an advance notice of proposed amendments to the regulations. 77 FR 16501-01 (Mar. 21, 2012). The agencies gave notice of a safe harbor for certain non-profit organizations that object to the mandatory coverage of contraception. Under this safe harbor, a qualifying organization would not be subject to penalties for failing to comply with the regulations regarding Women's Preventive Healthcare until the first plan year on or after August 1, 2013. This respite would allow the agencies time to potentially amend the definition of religious employer. Id. The safe harbor

applies to organizations meeting all of the following requirements:

> (1) The organization is organized and operates as a non-profit entity.
> (2) From February 10, 2012 onward, contraceptive coverage has not been provided at any point by the group health plan established or maintained by the organization, consistent with any applicable State law, because of the religious beliefs of the organization.
> (3) ... [T]he group health plan established or maintained by the organization ... must provide to participants [a]n attached notice ... which states that contraceptive coverage will not be provided ... .
> (4) The organization self-certifies that it satisfies criteria 1-3 above ... .

Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, CTR FOR CONSUMER INFO. & INS. OVERSIGHT & CTRS. FOR MEDICARE & MEDICAID SVCS. (Feb. 10, 2012), http://cciio.cms.gov/resources/files/Files2/02102012/20120 10-Preventive-Services-Bulletin.pdf.

B. <u>The Plaintiffs</u>

Plaintiff, Conestoga Wood Specialties Corporation ("Conestoga"), is a closely-held, for-profit Pennsylvania corporation that manufactures wood cabinets and wood specialty products. It is owned and operated by Plaintiffs Norman Hahn,

Elizabeth Hahn, Norman Lemar Hahn, Anthony H. Hahn, and Kevin Hahn ("the Hahns"), the founder of Conestoga, his wife and their sons, respectively.[4] In addition to being shareholders, the Hahns maintain various positions on the board of directors, and Plaintiff Anthony H. Hahn serves as President and Chief Executive Officer of Conestoga. The corporation presently employs approximately 950 full-time employees. (Am. Compl. ¶¶ 11-16, 37.)

The Hahns are practicing Mennonite Christians whose faith requires them to operate Conestoga in accordance with their religious beliefs and moral principles. (Id. at ¶¶ 2, 27.) Conestoga's mission statement includes the following language: "We operate in a professional environment founded upon the highest ethical, moral, and Christian principles reflecting respect, support, and trust for our customers, our suppliers, our employees and their families." (Pls.' Br., Ex. 1.) Both Conestoga and the Hahns make annual contributions to various charities and community organizations in accordance with the Hahns' religious beliefs. (Am. Compl. ¶ 35.) Further, on October 31, 2012, the board of directors adopted "The Hahn Family Statement on the Sanctity of Human Life."[5] (Pls.'

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[4] These five members of the Hahn family possess 100% of the voting shares of Conestoga's stock. Additional, non-voting shares are held by other members of the Hahn family. (Hrg. Tr., Jan. 4, 2013, pp. 11, 19.)

[5] This statement provides that:

"The Hahn family has always believed that the Bible is the inspired, infallible, and authoritative written word of God, the one and only eternal God.

Found in the Bible, Exodus 20:13 (NIV) as one of the 'Ten

Br., Ex. 5.) Conestoga's Articles of Incorporation are silent as to any religious purpose or belief. (Defs.' Br., Ex. 1.)

Conestoga provides employees with a health insurance plan that covers a number of women's preventive health expenses, such as pregnancy-related care, routine gynecological care and testing for sexually transmitted diseases. (Am. Compl. ¶ 84.) However, Conestoga's health plan specifically excludes coverage for "contraceptive prescription drugs" and "[a]ny drugs used to abort a pregnancy." (Pls.' Br., Ex. 6.)

"The Mennonite Church teaches that taking of life which includes anything that terminates a fertilized embryo is an intrinsic evil and a sin against God." (Am. Compl. ¶ 30.) Therefore, the Hahns believe it would be sinful for them to pay for,

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Commandments[,]' God commands, 'You shall not murder[.]'

Found in the Bible, Psalms 139:13-16 (NIV), the writer acknowledges God in how he was made and says[,] 'For you created my inmost being; you knit me together in my mother's womb. I praise you because I am fearfully and wonderfully made; your works are wonderful, I know that full well. My frame was not hidden from you when I was made in the secret place, when I was woven together in the depths of the earth. Your eyes saw my unformed body; all the days ordained for me were written in your book before one of them came to be.'

The Hahn Family believes that human life begins at conception (at the point where an egg and sperm unite) and that it is a sacred gift from God and only God has the right to terminate human life. Therefore it is against our moral conviction to be involved in the termination of human life through abortion, suicide, euthanasia, murder, or any other acts that involve the deliberate taking of human life."

or contribute in any way to, the use of abortifacient contraception, which they define as, any drug or device that may "terminate[ ] a fertilized embryo." (Id. at ¶¶ 30, 32.) The Hahns specifically object to prescription plan coverage of "Plan B," commonly known as the "morning after pill," and "Ella," also known as the "week after pill."[6] (Id. at ¶¶ 45-46.)

As a for-profit corporation, Conestoga does not fit into an exemption for religious employers, nor does it fall under the safe harbor. Additionally, Conestoga's health plan does not qualify as a grandfathered plan under 26 C.F.R. § 54.9815-1251T. Therefore, Plaintiffs are currently left to choose between providing coverage to employees for abortifacient contraception, which they contend violates their right to religious freedom, or pay significant financial penalties. Confronted with this choice, Plaintiffs filed the instant motion for preliminary injunction.

II. STANDARD OF REVIEW

"Preliminary injunctive relief is 'an extraordinary remedy' and 'should be granted only in limited circumstances.'" Kos Pharm., Inc. v. Andrx Corp., 369 F.3d 700, 708 (3d Cir. 2004) (quoting American Tel. & Tel. Co. v. Winback & Conserve Program, Inc., 42 F.3d 1421, 1427 (3d Cir. 1994)). In order for a court to grant a motion for preliminary

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[6] We note that Defendants do not agree that Plan B or Ella can cause the termination of a fertilized egg. However, Defendants agree that it is Plaintiffs' belief that these drugs can have an abortifacient effect. (Hrg. Tr., Jan. 4, 2013, p. 69.)

injunction, the moving party must demonstrate: "(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." Id. at 708. "The injunction shall issue only if the plaintiff produces evidence sufficient to convince the district court that all four factors favor preliminary relief." N.J. Hosp. Ass'n v. Waldman, 73 F.3d 509, 512 (3d Cir. 1995) (citing American Tel & Tel Co., 42 F.3d at 1427).

In demonstrating the likelihood of success on the merits, a plaintiff need not show that it is more likely than not that he will succeed. Singer Mgmt. Consultants, Inc. v. Milgram, 650 F.3d 223, 229 (3d Cir. 2011). Instead, a plaintiff must "show[ ] a reasonable probability of success on the merits." American Express Travel Related Svcs., Inc. v. Sidamon-Eristoff, 669 F.3d 359, 366 (3d Cir. 2012).

We note that other courts that have decided cases with similar facts and ruled in favor of injunctive relief have generally applied a less rigorous standard. For example, in Tyndale House Publishers, Inc. v. Sebelius, 2012 WL 5817323 (D.D.C. Nov. 16, 2012), when evaluating the preliminary injunction factors, the district court applied a "sliding scale approach," whereby an unusually strong showing of one factor lessens a plaintiff's burden in demonstrating a different factor. Id. at *4; see also Korte v. Sebelius, 2012 WL 6757353, at *2 (7th Cir. Dec. 28, 2012) ("[w]e

evaluate a motion for an injunction pending appeal using the . . . 'sliding scale' approach"); Sharpe Holdings, Inc. v. U.S. Dept. of Health & Human Svcs., 2012 WL 6738489, at *4 (E.D. Mo. Dec. 31, 2012) ("[i]n balancing the equities no single factor is determinative") (quoting Dataphase Sys., Inc. v. CL Sys. Inc., 640 F.2d 109, 113 (8th Cir. 1981)); Monaghan v. Sebelius, 2012 WL 6738476, at *3 (E.D. Mich. Dec. 30, 2012) (same); American Pulverizer Co. v. U.S. Dept. of Health & Human Svcs., No. 12-3459-CV-S-RED, slip op. at 4 (W.D. Mo. Dec. 20, 2012) (same); Legatus v. Sebelius, 2012 WL 5359630, at *3 (E.D. Mich. Oct. 31, 2012) (same). The United States Court of Appeals for the Third Circuit, however, has no such "sliding scale" standard, and Plaintiffs must show that all four factors favor preliminary relief. Pitt News v. Fisher, 215 F.3d 354, 365-66 (3d Cir. 2000).

III. DISCUSSION

A. Article III Standing

As a preliminary matter, we must determine whether a "case or controversy" exists, such that this Court has jurisdiction under Article III. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). A plaintiff bears the burden of demonstrating that he has Article III standing. ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 301 (3d Cir. 2012). To satisfy this burden, a plaintiff must show:

> (1) that he is under a threat of suffering an injury in fact that is concrete and

> particularized; the threat must be actual and imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of; and (3) a likelihood that a favorable judicial decision will prevent or redress the injury.

Id. (citing Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009)) (internal quotation marks omitted).

Defendants assert that Plaintiffs have not satisfied the standing requirement because "[P]laintiffs cannot show that any injury purportedly caused by the preventive services coverage regulations is fairly traceable to [D]efendants, as opposed to the result of [P]laintiffs' own independent choices." (Defs.' Br., pp. 9-10.) Specifically, Defendants argue that Conestoga's health insurance plan would have been exempt from the regulations as a grandfathered plan, but that Plaintiffs failed to follow the requirements of 26 C.F.R. § 54.9815-1251T. Therefore, Defendants urge that any injury is self-inflicted, and does not satisfy the requirements for Article III standing. We disagree.

Under the second prong of the test for standing, Plaintiffs must demonstrate that the injury is "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1442 (2011) (alteration in original) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)) (internal quotation marks omitted). Although

Plaintiffs admit that Conestoga could have qualified for grandfathered status if it had maintained the same plan as that provided in previous years, (Hrg. Tr., Jan. 4, 2013, pp. 61-62), Defendants acknowledge that "grandfathering is not really a permanent 'exemption,' but rather, over the long term, a transition in the marketplace with respect to ... the preventive services coverage provision." (Defs.' Resp., p. 26.) Thus, it cannot be said that Defendants play no role in the alleged injury to the Plaintiffs, since, according to Defendants, Conestoga would be subject to the regulations eventually, even if it initially qualified for grandfathered status. As such, we are satisfied that Plaintiffs have demonstrated Article III standing.

B. Likelihood of Success on the Merits

We are mindful that this case is one of many filed against the government in recent months by secular, for-profit corporations and their owners regarding the Women's Preventive Healthcare regulations. These lawsuits, most of which have sought preliminary injunctions, present complicated issues of first impression, such as whether a corporation has free exercise protections under the First Amendment of the Constitution, and whether the Women's Preventive Healthcare regulations create a "substantial burden" on Plaintiffs' exercise of religion under the Religious Freedom Restoration Act ("RFRA"). Not surprisingly, courts who have considered these issues have reached different

outcomes.[7]

In their motion, Plaintiffs argue the merits of their claims under the First Amendment and the RFRA. We will address each of these claims in turn.

1. The Free Exercise Clause of the First Amendment

The Free Exercise Clause of the First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. Plaintiffs argue that the operation of Conestoga in accordance with the Hahns' religious beliefs constitutes the "exercise of religion" under the

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[7] Compare Korte v. Sebelius, 2012 WL 6757353 (7th Cir. Dec. 28, 2012) (granting injunction pending appeal), O'Brien v. U.S. Dept. of Health & Human Svcs., No. 12-3357 (8th Cir. Nov. 28, 2012) (granting "[a]ppellants' motion for stay pending appeal," without further comment), Sharpe Holdings, Inc. v. U.S. Dept. of Health & Human Svcs., 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012) (granting motion for temporary restraining order), Monaghan v. Sebelius, 2012 WL 6738476 (E.D. Mich. Dec. 30, 2012) (same), American Pulverizer Co. v. U.S. Dept. of Health & Human Svcs., No. 12-3459-CV-S-RED, slip op. (W.D. Mo. Dec. 20, 2012) (granting preliminary injunction), Tyndale House Publishers, Inc. v. Sebelius, 2012 WL 5817323 (D.D.C. Nov. 16, 2012) (same), Legatus v. Sebelius, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012) (same), and Newland v. Sebelius, 2012 WL 3069154 (D. Colo. July 27, 2012) (same), with Autocam Corp. v. Sebelius, No. 12-2673, slip op. (6th Cir. Dec. 28, 2012) (denying preliminary injunction pending appeal), Hobby Lobby Stores, Inc. v. Sebelius, No. 12-6294, slip op. (10th Cir. Dec. 20, 2012) (same), and Grote Indus., LLC v. Sebelius, 2012 WL 6725905 (S.D. Ind. Dec. 27, 2012) (denying motion for preliminary injunction).

Free Exercise Clause, and that being forced to provide coverage for all FDA-approved contraception substantially burdens their religious beliefs.

In resolving this issue, we must, as a threshold matter, determine whether Plaintiffs have "free exercise" rights under the First Amendment. The Hahns certainly possess these rights. We conclude, however, that Conestoga, as a for-profit, secular corporation, does not.

i. Conestoga's Free Exercise Rights

Neither the Supreme Court nor the Third Circuit have had occasion to decide whether forprofit, secular corporations possess the religious rights held by individuals. Certainly, a number of constitutional freedoms have been extended to corporations. See e.g., Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 913 (2010) ("the Government may not suppress political speech on the basis of the speaker's corporate identity"); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) (applying the Fifth Amendment's double jeopardy protections to a corporation); G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977) (extending Fourth Amendment search and seizure protections to a corporation). However, there are certain "purely personal" guarantees that are unavailable to corporations. First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 778, n.14 (1978) (citing United States v. White, 322 U.S. 694, 698-701 (1944)); see also Wilson v. United States, 221 U.S. 361, 382-86 (finding that the privilege against self-incrimination

does not apply to corporations); Cal. Bankers Ass'n v. Schultz, 416 U.S. 21, 65-67 (1974) (declining to extend to a corporation the right to privacy to the same extent as individuals). "Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision." Bellotti, 435 U.S. at 778, n.14.

Plaintiffs cite to Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010), for the proposition that a secular, for-profit corporation has free exercise rights under the Constitution. In Citizens United, the Supreme Court held a provision of the Bipartisan Campaign Reform Act of 2002 unconstitutional because it impeded corporations' abilities to engage in political discourse in violation of the Free Speech Clause of the First Amendment. Id. at 917. In reaching its decision, the Court focused on the history and purpose of free speech rights, particularly political speech, noting that "[t]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." Id. at 898 (quoting Eu v. San Francisco Cnty. Democratic Central Comm., 489 U.S. 214, 223 (1989)) (quotation marks omitted). Citizens United built upon the long-accepted principle that corporations have free speech rights protected by the Constitution. See id. at 899-900 (citing numerous cases that found corporations to have free speech rights under the First Amendment). However, we find no such historical support for the proposition that a secular, for-profit corporation

possesses the right to free exercise of religion.

Plaintiffs urge that the rights to free speech and free exercise of religion are inseparable, and thus Citizens United must extend to the Free Exercise Clause. (Hrg. Tr., Jan. 4, 2013, p. 27.) This argument assumes too much. Although they reside within the same constitutional amendment, these two provisions have vastly different purposes and precedents, and we decline to make the significant leap Plaintiffs ask of us without clear guidance from Congress or the Supreme Court.[8]

Plaintiffs also urge this Court to find that Conestoga has free exercise rights by citing to cases in which religious organizations were granted free exercise protections. While religious organizations, as a means by which individuals practice religion, have been afforded free exercise rights, see Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012) ("the text of the First Amendment . . . gives special solicitude to the rights of religious organizations"); see also Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993), courts have consistently limited such holdings to

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[8] We recognize that a number of courts that have considered this issue have cited Citizens United for the proposition that secular corporations may have free exercise rights. See Korte v. Sebelius, 2012 WL 6757353, at *3; Legatus, 2012 WL 5359630, at *4. However, these courts provided little explanation for their findings, and we disagree for the reasons stated supra.

religious organizations.[9] We find the distinction between religious organizations and secular corporations to be meaningful, and decline to act as though this difference does not exist.

The purpose of the Free Exercise Clause is "to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority." Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223 (1963) (emphasis added). Religious belief takes shape within the minds and hearts of individuals, and its protection is one of the more uniquely "human" rights provided by the Constitution. As recognized in Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2012), "[g]eneral business corporations . . . do not pray, worship, observe sacraments or take other

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[9] In determining whether an organization constitutes a "religious organization," courts weigh the following factors: "(1) whether the entity operates for a profit[;] (2) whether it produces a secular product[;] (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose[;] (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue[;] (5) whether a formally religious entity participates in the management . . . [;] (6) whether the entity holds itself out to the public as secular or sectarian[;] (7) whether the entity regularly includes prayer or other forms of worship in its activities[;] (8) whether it includes religious instruction in its curriculum . . . [;] and whether its membership is made up by coreligionists." LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 226 (3d Cir. 2007).

Conestoga, as a for-profit company, creating a secular product, with no formal ties to a church or other religious group, clearly does not meet the definition of a religious organization.

religiously-motivated actions separate and apart from the intention and direction of their individual actors." Id. at 1291. Therefore, we conclude that the nature, history and purpose of the Free Exercise Clause demonstrate that it is one of the "purely personal" rights referred to in Bellotti, and as such, is unavailable to a secular, for-profit corporation.

Alternatively, Plaintiffs argue that, as a closely-held corporation, with shareholders who all practice the Mennonite faith, Conestoga may act as the Hahns' "alter-ego," and thus assert the Hahns' religious rights on their behalf. Plaintiffs cite to Tyndale House Publishers, Inc. v. Sebelius, 2012 WL 5817323 (D.D.C. Nov. 16, 2012), a case in which the plaintiffs also challenged the ACA Women's Preventive Healthcare regulations, for support. Tyndale held that where the beliefs of a closely-held corporation and its owners are indistinguishable, "united by their [ ] faith . . . [and] shared, religious objectives[,]" the corporation has standing to assert the free exercise rights of its owners. Id. at *7. Tyndale largely relied upon two cases from the United States Court of Appeals for the Ninth Circuit in reaching this conclusion: Stormans, Inc. v. Selecky, 586 F.3d 1109 (9th Cir. 2009) and EEOC v. Townley Engineering and Manufacturing Co., 859 F.2d 610 (9th Cir. 1988).[10] In Stormans and Townley, the Ninth Circuit held that a closely-held

[10] Plaintiffs also cite to Legatus v. Sebelius, 2012 WL 5359630, at *4 (E.D. Mich. Oct. 31, 2012), in which the court found "a strong case for standing, at least on a Stormans pass-through instrumentality theory." For the sake of simplicity, we will focus on the Tyndale decision in our analysis.

corporation that "does not present any free exercise rights of its own different from or greater than its owners' rights . . . has standing to assert the free exercise rights of its owners." Stormans, 586 F.3d at 1120; see also Townley, 859 F.2d at 619-20. We are not persuaded by this line of reasoning.

"[I]ncorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001). "Even when a corporation is owned by one person or a family, the corporate form shields the individual members of the corporation from personal liability." Kelleytown Co. v. Williams, 426 A.2d 663, 668 (Pa. Super. Ct. 1981). It would be entirely inconsistent to allow the Hahns to enjoy the benefits of incorporation, while simultaneously piercing the corporate veil for the limited purpose of challenging these regulations. We agree with the Autocam court, which stated that this separation between a corporation and its owners "at a minimum [ ] means the corporation is not the *alter ego* of its owners for purposes of religious belief and exercise."[11] Autocam Corp. v. Sebelius, No. 1:12-cv-

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[11] We further note that the facts in the present case are distinguishable from the facts in Tyndale. The Tyndale court relied on the plaintiff's unique corporate structure in reaching its decision. Tyndale House Publishers, Inc. is a Christian, faith-based book publisher that holds weekly chapel service for its employees and is 96.5% owned by a religious non-profit organization. Tyndale's Articles of Incorporation make numerous references to the corporation's religious purpose and its board members and trustees are required to sign a

1096, slip op. at 12 (W.D. Mich. Dec. 24, 2012) (emphasis in original).

Accordingly, we conclude that Conestoga cannot assert free exercise rights under the First Amendment, and therefore, cannot demonstrate a likelihood of success on the merits for a free exercise claim.

ii. Hahn's Free Exercise Rights

Next, we must assess the Hahns' likelihood of success on their free exercise claim. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993). Where a law is found to violate the Free Exercise Clause, "it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." Id. at 533.

The Free Exercise Clause is not, however, violated by a "valid and neutral law of general applicability on the ground that the law proscribes

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statement of faith each year, demonstrating their religious convictions. Tyndale, 2012 WL 5817323, at *6-7. Conestoga, on the other hand, has none of these characteristics. We do not doubt that the Hahns' religious convictions have influenced the manner in which they operate Conestoga. (See Exs. 1-5.) However, the substantial overlap of faith and business found in Tyndale is simply not present here.

(or prescribes) conduct that [a plaintiff's] religion prescribes (or proscribes)." Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263, n.3 (1982)). A neutral law of general applicability need only be "rationally related to a legitimate government objective" to be upheld. Combs v. Homer-Ctr. Sch. Dist., 540 F.3d 231, 243 (3d Cir. 2008) (quoting Tenafly Eruv Ass'n, Inc. v. Tenafly, 309 F.3d 144, 165, n. 24 (3d Cir. 2002)).

Plaintiffs first argue that the regulations are not generally applicable because they are underinclusive. Specifically, Plaintiffs point to the exemptions for grandfathered plans, small employers who may forego providing insurance without penalty and religious employers. A regulation is not generally applicable "if it is enforced against a category of religiously motivated conduct, but not against a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated." McTernan v. City of York, 564 F.3d 636, 648 (3d Cir. 2009) (internal citations omitted). The Women's Preventive Healthcare regulations, however, apply to all health plans "not falling under an exemption, regardless of those employers' personal religious inclinations." O'Brien v. U.S. Dept. of Health & Human Svcs., 2012 WL 4481208, at *8 (E.D. Mo. Sept. 28, 2012). They are not specifically targeted at conduct motivated by religious belief.

Plaintiffs also argue that the Women's Preventive Healthcare regulations are not neutral because they exclude some religious employers but not others. "A law is 'neutral' if it does not target religiously motivated conduct either on its face or as applied in practice." Blackhawk v. Pennsylvania, 381 F.3d 202, 209 (3d Cir. 2004). The fact that exemptions were made for religious employers does not indicate that the regulations seek to burden religion. Instead, it shows that the government made efforts to accommodate religious beliefs, which counsels in favor of the regulations' neutrality. See O'Brien, 2012 WL 4481208, at *8 ("the religious employer exemption presents a strong argument in favor of neutrality"). It is clear from the history of the regulations and the report published by the Institute of Medicine that the purpose of the Women's Preventive Healthcare regulations is not to target religion, but instead to promote public health and gender equality, and Plaintiffs have not presented any evidence to the contrary. See Hobby Lobby, 870 F. Supp. 2d at 1289-90; O'Brien, 2012 WL 4481208, at *7.

As Defendants can clearly demonstrate that the regulations are "rationally related to a legitimate government objective," the regulations do not offend the Free Exercise Clause. Consequently, Plaintiffs have failed to show a likelihood of success on the merits of their free exercise claim.

2. The Religious Freedom Restoration Act

The Religious Freedom Restoration Act ("RFRA")

states that, "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government can demonstrate that "the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.[12] The plaintiff has the burden of establishing the elements of a prima facie case: that application of the offensive law or policy would substantially burden a sincere, religious exercise. See Norwood v. Strada, 249 Fed. Appx. 269, 271 (3d Cir. 2007). Once a prima facie case has been satisfied, the government bears the burden of demonstrating a compelling interest and that the government employed the least restrictive means in carrying out that interest. Adams v. Comm'r of Internal Revenue, 170 F.3d 173, 176 (3d Cir. 1999); see also Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 428-29 (2006) (under the RFRA, "the burdens at the preliminary injunction stage track the burdens at trial").

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[12] The Supreme Court has held that the RFRA exceeds Congress's power under Section 5 of the Fourteenth Amendment, and is therefore unconstitutional as applied to the states. City of Boerne v. Flores, 521 U.S. 507 (1997). Although the Third Circuit has never explicitly decided whether the RFRA is constitutional as applied to the federal government, the parties do not contest the constitutionality or applicability of the RFRA in this case. Therefore, we "assume without deciding that [the] RFRA is constitutional as applied to the federal government." Norwood v. Strada, 249 Fed. Appx. 269, 271, n. 3 (3d Cir. 2007) (quoting Adams v. Comm'r of Internal Revenue, 170 F.3d 173, 175 (3d Cir. 1999)).

Plaintiffs argue that the operation of Conestoga in accordance with the Hahns' religious beliefs constitutes the "exercise of religion" under the RFRA, and that the Women's Preventative Healthcare regulations impose a substantial burden upon their religion because "it directly mandates that they violate th[eir] beliefs." (Pls.' Br., p. 9.) Additionally, Plaintiffs argue that Supreme Court precedent dictates that we consider only the amount of pressure applied by the government, and not interpret the confines of religious doctrine. (Id. at pp. 12-14.)

Defendants do not contest that the Hahns' beliefs are sincerely held or religious in nature. However, Defendants strongly assert that Conestoga cannot exercise religion within the meaning of the RFRA, and that the Women's Preventative Healthcare regulations do not pose a substantial burden upon the Hahns' beliefs because: (1) the regulations apply to Conestoga, not the Hahns; and (2) any burden imposed by the regulations is too attenuated to constitute a substantial burden. (Defs.' Br., pp. 11-22.)

i. Conestoga's Rights Under the RFRA

For the reasons stated supra, we agree with Defendants that Conestoga cannot exercise religion within the meaning of the RFRA.

Nonetheless, Plaintiffs persist that Conestoga is a "person" under the RFRA because the general

definition of "person" found in 1 U.S.C. § 1 states, "[I]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' includes corporations." As we have determined that a for-profit, secular corporation cannot exercise religion, this would certainly be a situation where the "context indicates otherwise." Therefore, Conestoga cannot bring a claim under the RFRA.

We must next consider whether the Hahns have demonstrated that the regulations would substantially burden their religious exercise.

ii. Substantial Burden

The Supreme Court has not considered the issue of what constitutes a substantial burden in a case involving the Women's Preventive Healthcare regulations. See Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 643 (2012) (Sotomayor, J.) (noting that the Supreme Court has not considered the RFRA or free exercise claims brought by a closely-held, for-profit corporation and shareholders alleging that regulations substantially burdened their exercise of religion). However, in considering a free exercise of religion challenge in a different context,[13] the Supreme Court has observed:

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[13] When conducting an analysis under the RFRA, courts generally look to free exercise cases decided prior to Employment Div., Dept. of Human Resources of Or. v. Smith, 494 U.S. 872 (1990), for guidance, since those earlier cases employ the same standard as that codified by Congress in the RFRA. See Adams v. Comm'r of Internal Revenue, 170 F.3d

> Where the state conditions the receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by a religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 717-18 (1982).

In articulating the guidelines for when religious freedoms may be infringed, the Supreme Court has also cautioned that: "every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." United States v. Lee, 455 U.S. 252, 261 (1982).

Neither has the Third Circuit applied the "substantial burden" standard to the Women's Preventive Healthcare regulations. Nevertheless, in examining the RFRA as applied to a different

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173, 175-79 (3d Cir. 1999).

statute, the Third Circuit has stated:

> The RFRA does not explain what constitutes a "substantial burden" on the exercise of religion. We have stated, however, that within the related context of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), a "substantial burden" "exists where: 1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other inmates versus abandoning one of the precepts of his religion in order to receive a benefit; OR [sic] 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs."

Norwood v. Strada, 249 Fed. Appx. 269, 271 (3d Cir. 2007) (quoting Washington v. Klem, 497 F.3d 272, 280 (3d Cir. 2007)) (quotation marks omitted).

With this general precedential background from the Supreme Court and the Third Circuit in mind, we note that the flurry of opinions recently issued in similar cases have all directly considered the "substantial burden" test as applied to the Women's Preventive Healthcare regulations. We concur with the district court in the Western District of Oklahoma, which observed that, "[t]he present circumstances require charting a course through the 'treacherous terrain' at the intersection of the federal government's duty to avoid imposing burdens on the individual's practice of religion and the protection of

competing interests." Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1293 (W.D. Okla. 2012). That said, we believe that two opinions best explain and contrast the differing views on this issue.

In Tyndale House Publishers, Inc. v. Sebelius, 2012 WL 5817323 (D.D.C. Nov. 16, 2012), the district court granted a preliminary injunction, finding that the contraceptive coverage mandate substantially burdened the plaintiffs' religious exercise. In so holding, the court focused on the financial pressure that the plaintiffs faced if they chose not to comply with the Women's Preventive Healthcare regulations. Id. at *12. The court concluded that this scenario creates a "Hobson's choice," and "amply shows that the contraceptive coverage mandate substantially burdens the plaintiffs' religious exercise." Id. In conducting its analysis, the Tyndale court primarily relied on three cases. See Wisconsin v. Yoder, 406 U.S. 205, 218-19 (1972) (mandatory school attendance law substantially burdens Amish faith); Sherbert v. Verner, 374 U.S. 398, 404 (1963) (substantial burden to deny unemployment benefits to a worker fired for not working on her Sabbath); Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 714 (9th Cir. 1999) rev'd on other grounds en banc, 220 F.3d 1134 (9th Cir. 2000) (law prohibiting discrimination in housing based on marital status substantially burdened landlord's religion).

Reaching a different result than Tyndale, the district court in Hobby Lobby, ruled that the

plaintiffs could not establish that the regulations created a substantial burden. 870 F. Supp. 2d at 1294-96. While recognizing that it is not within a court's province to question a plaintiff's religious beliefs, the court emphasized that this precept does not mean that any burden on religion is prohibited. Id. at 1293. Rather, the court stressed that the burden imposed by the law must be substantial in order to violate the RFRA. Id. The Hobby Lobby court ultimately concluded that the burden in question was too attenuated to be substantial. Id. at 1294.

Only a few weeks ago, the United States Court of Appeals for the Tenth Circuit affirmed the district court's reasoning in Hobby Lobby, agreeing that the plaintiffs could not establish a substantial burden. The Tenth Circuit quoted the following statement by the district court with approval:

> [T]he particular burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [the corporate] plan, subsidize *someone else's* participation in an activity that is condemned by plaintiff[s'] religion. Such an indirect and attenuated relationship appears unlikely to establish the necessary "substantial burden."

Hobby Lobby Stores, Inc. v. Sebelius, No. 12-6294, slip op. at 7 (10th Cir. Dec. 20, 2012) (quoting Hobby

Lobby, 870 F. Supp. 2d at 1294) (emphasis in original). The Tenth Circuit went on to stress that "other cases enforcing [the] RFRA have done so to protect a plaintiff's own participation in (or abstention from) a specific practice required (or condemned) by his religion." Id. The court concluded that the reach of the RFRA does not "encompass the independent conduct of third parties with whom the plaintiffs have only a commercial relationship." Id.

While we view the "substantial burden" issue to be a closer call than whether Conestoga, acting as a corporation, can exercise religious rights, for the reasons that follow, we agree with the reasoning expressed in the Hobby Lobby opinions, and find that the Hahns have not demonstrated that these regulations constitute a substantial burden upon their religion.

First, we reject the notion expressed in Legatus v. Sebelius, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012), that a plaintiff shows a burden to be substantial simply by claiming that it is. Id. at *6 (citing United States v. Lee, 455 U.S. 252, 257 (1982); May v. Baldwin, 109 F.3d 557, 563 (9th Cir. 1997) (where the court assumed that undoing dreadlocks imposed a substantial burden on plaintiff's exercise of religion)). While we wholeheartedly agree that "courts are not the arbiters of scriptural interpretation," Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981), the RFRA still requires the court to determine whether the burden a law imposes on a plaintiff's stated religious belief is "substantial."

Essentially, the Legatus court bypassed a careful examination of whether an objector's stated burden was in fact substantial, and concluded that the substantial burden test could be met simply because the objector proclaimed such a burden existed. This reasoning presents a very slippery slope upon which we are not prepared to descend.[14]

If every plaintiff were permitted to unilaterally determine that a law burdened their religious beliefs, and courts were required to assume that such burden was substantial, simply because the plaintiff claimed that it was the case, then the standard expressed by Congress under the RFRA would convert to an "any burden" standard. See Washington v. Klem, 497 F.3d 272, 279-81 (3d Cir. 2007) (arguing that finding a substantial burden whenever a government program has "any incidental effect" on religious beliefs would "read 'substantial' out of the statute"). Aside from being contrary to the plain language of the RFRA, this type of blind application would permit any religious objector to refuse to comply with Congressional mandates based solely on stated religious objections, which could include laws dealing with public and workplace safety, and discrimination. See Autocam Corp v. Sebelius, No. 1:12-cv-1096, slip op. at 12-13 (W.D.

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[14] The term "slippery slope," a commonly used legal phrase, means "a course of action that seems to lead inevitably from one action or result to another with unintended consequences." MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/slippery%20slope (last visited Jan. 9, 2013). This definition aptly describes what would occur were we to follow the reasoning in Legatus.

Mich. Dec. 24, 2012) (opining that, if a court cannot look beyond a plaintiff's sincerely held assertion of religious based objections to determine whether the regulations impose a substantial burden, every governmental regulation would be susceptible to a "private veto").

As noted previously, the Supreme Court in Lee recognized that free exercise protections are not absolute, and that, while religious beliefs are to be accommodated, "there is a point at which accommodations would 'radically restrict the operating latitude of the legislature.'" Lee, 455 U.S. at 260 (quoting Braunfeld v. Brown, 366 U.S. 599, 605 (1961)). The Hahns, in operating Conestoga, understood that a commercial enterprise would be subject to numerous laws regulating commerce. We agree with the district court in Hobby Lobby that, for those laws or regulations to violate the RFRA, "there must be more than some burden on religious exercise. The burden must be substantial." Hobby Lobby, 870 F. Supp. at 1295.

With these principles in mind, we turn to the question of how the Women's Preventive Healthcare regulations burden the religious belief articulated by the Hahns. At the preliminary injunction hearing, Plaintiffs' counsel emphasized that the heart of Plaintiffs' objections are focused on the use of abortifacient contraceptives that can affect a fertilized egg. Counsel stated:

> Because many of these drugs not only have some medical effect on the egg, but they also

> affect the lining of a woman's uterus and thus interfere with the implantation of the egg, our concern and our clients' deeply held religious concern, is that any fertilized egg that's prevented from implanting, that's aborted the morning after or a week after, any interruption of a woman's lining of her uterus, any drug that would do that, that would be involved in that, is what they are most sincerely and deeply opposed to.

(Hrg. Tr., Jan. 4, 2013, pp. 67-68) (emphasis added). As this statement reflects, the core of the Hahns' religious objection is the effect of particular contraceptives on a fertilized egg. Given that focus, it is worth emphasizing that the ultimate and deeply private choice to use an abortifacient contraceptive rests not with the Hahns, but with Conestoga's employees. The fact that Conestoga's employees are free to look outside of their insurance coverage and pay for and use any contraception, including abortifacients, through the salary they receive from Conestoga, amply illustrates this point. Autocam, No. 1:12-cv-1096, slip op. at 11 (noting that plaintiffs will be "paying indirectly for the same services through wages" that their employees may choose to use "for contraception products and services").

We also find that any burden imposed by the regulations is too attenuated to be considered substantial. A series of events must first occur before the actual use of an abortifacient would come into play. These events include: the payment for insurance to a group health insurance plan that will

cover contraceptive services (and a wide range of other health care services); the abortifacients must be made available to Conestoga employees through a pharmacy or other healthcare facility; and a decision must be made by a Conestoga employee and her doctor, who may or may not choose to avail themselves to these services.

The indirect nature of the burden[15] imposed by the Women's Preventive Healthcare regulations also distinguishes this case from the precedent relied upon by the Tyndale court.[16] For example, in Yoder, the Amish plaintiffs were threatened with prosecution for their refusal to send their children to school in violation of their religious beliefs. 406 U.S. at 218. In Sherbert, the government denied the plaintiff's unemployment benefits because she had

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[15] Relying on the Supreme Court's statement in Thomas v. Review Bd. of Ind. Emp't Sec. Div., that "[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial," 450 U.S. 707, 718 (1982), Plaintiffs strongly assert that the indirect nature of the burden is not fatal to their claim. However, Plaintiffs' misunderstand the principle asserted in Thomas. While a compulsion may certainly be indirect and still constitute a substantial burden, such as the denial of a benefit found in Thomas, "[t]o strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion . . . would radically restrict the operating latitude of the legislature." Braunfeld v. Brown, 366 U.S. 599, 606 (1961).

[16] The Tyndale court also considered it a "crucial distinction" that the plaintiff was self-insured as this fact removed one of the "degrees" of separation. Tyndale, 2012 WL 5817323, at *13. Here, Conestoga is not self-insured, thus creating further distance between the Women's Preventive Healthcare regulations and the possible use of abortifacients.

been fired for refusing to work on her Sabbath. 374 U.S. at 403-04. In Thomas, the plaintiffs were forced to comply with a housing mandate based on marital status. 615 F.3d at 1137-38. And, in Gonzales, a case mentioned only briefly in Tyndale, but heavily relied upon by Plaintiffs, prosecution was threatened where members of a church received communion through the drinking of tea that contained a hallucinogen. 546 U.S. at 423. The common thread in these cases is that the government mandate directly impacted the plaintiff's participation in or abstention from a specific religious practice. That is not the case here.

While compliance with the Women's Preventive Healthcare regulations may impose some burden upon the Hahns, any such burden on their ability to freely exercise their religion would be indirect, unlike the statutes challenged in Yoder, Sherbert, Thomas and Gonzales. Importantly, Plaintiffs remain free to make their own independent decisions about their use or non-use of different forms of contraception, as that clearly remains a personal matter. See O'Brien v. U.S. Dept. of Health & Human Svcs., 2012 WL 4481208, at *6 (Women's Preventive Healthcare regulations do not require "that plaintiffs alter their behavior in a manner that will directly and inevitably prevent [them] from acting in accordance with their religious beliefs").

Conestoga's corporate form further separates the Hahns from the requirements of the ACA, as the Women's Preventive Healthcare regulations apply only to Conestoga, a secular corporation without free

exercise rights, not the Hahns. Whatever burden the Hahns may feel from being involved with a for-profit corporation that provides health insurance that could possibly be used to pay for contraceptives, that burden is simply too indirect to be considered substantial under the RFRA.

Finally, we understand, and have carefully considered the fact that the Hahns may be less focused on what Conestoga's employees ultimately decide regarding the use of abortifacients, and more concerned with the burden imposed on their religion by the requirement that they provide insurance coverage that may be used to "pay for, facilitate, or otherwise support abortifacient drugs." (Am. Compl. ¶ 32.) We respect and fully appreciate this concern, and in no way dispute or denigrate its legitimacy and its effect as a burden upon the Hahns' religious beliefs. However, a line must be drawn delineating when the burden on a plaintiff's religious exercise becomes "substantial." We conclude that, here, that line does not extend to the speculative "conduct of third parties with whom plaintiffs have only a commercial relationship." Hobby Lobby, No. 12-6294, slip op. at 7 (10th Cir. Dec. 20, 2012).

3. The Establishment Clause

The "central purpose of the Establishment Clause [is] the purpose of ensuring governmental neutrality in matters of religion." Gillette v. United States, 401 U.S. 437, 449 (1971). Statutes violate this central purpose if they either "prefer one religion over another," Larson v. Valente, 456 U.S.

228, 246 (1982) (quoting Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947)), or create an "excessive government entanglement with religion," Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

Plaintiffs argue that the "religious employer" exemption does both. They argue that it discriminates among religions because some organizations qualify for the exemption, while others do not. Further, they claim that the decision about whether an organization qualifies for the exemption involves excessive entanglement with religion because it requires the government to "explore a religious organization's purpose in impermissible ways." (Pls.' Br., p. 32.)

Defendants, on the other hand, argue that the Establishment Clause does not prohibit provisions, such as the religious employer exemption, which accommodate religious organizations by excusing their compliance with certain regulations. They assert that the Establishment Clause only prohibits provisions that discriminate based upon religious denomination, not those that merely distinguish between secular and religious organizations. Further, Defendants argue that the exemption does not create excessive government entanglement with religion because the regulation does not call for an analysis of an organization's religious tenets. They assert that the intrusiveness of the statute is particularly minimal in Plaintiffs' case because Plaintiffs do not meet any of the criteria for the religious exemption.

We agree with Defendants, and with the other courts that have considered the issue, that the religious employer exemption does not violate the Establishment Clause. See Grote Indus., LLC v. Sebelius, 2012 WL 6725905, at *8-9 (S.D. Ind. Dec. 27, 2012); O'Brien, 2012 WL 4481208, at *9- 11. Although the exemption distinguishes between religious and secular organizations, it applies equally to organizations of every faith, and does not favor any denomination over another. A statute does not violate the Establishment Clause merely because it distinguishes between secular and religious organizations. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338 (1998) ("Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities."). Indeed, the Supreme Court has repeatedly held that laws, such as the ACA's religious employer exemption, which accommodate religion, have a secular purpose and apply equally to all faiths, do not run afoul of the Establishment Clause. See id. (exemption for religious organizations from Title VII's prohibition on religious discrimination in employment); see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 132 S.Ct. 694 (2012) (ministerial exception to Title VII's employment discrimination proscriptions); Cutter v. Wilkinson, 544 U.S. 709 (2005) (statute authorizing accommodations for religious practices of institutionalized persons); Walz v. Tax Comm'n, 397 U.S. 664, 666 (1970) (property

tax exemption "to religious organizations for religious properties used solely for religious worship").

Neither does the religious employer exemption create excessive government entanglement with religion. "The test [for excessive government entanglement] is inescapably one of degree." Walz, at 674. Some degree of involvement between government and religion is permissible, and perhaps inevitable. Id. The court must consider "whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." Id. at 675.

The "entanglement" created by the religious employer exemption is minimal. The regulation requires a one-time assessment based upon minimally invasive criteria. Specifically, an organization qualifies for an exemption if its purpose is the inculcation of religious values, it primarily employs and serves persons who share the organization's religious beliefs and it qualifies as a non-profit organization under the Internal Revenue Code. 45 C.F.R. § 147.130(a)(1)(iv)(B). This inquiry is far less invasive than other statutes the Supreme Court has previously upheld. See, e.g., Bowen v. Kendrick, 487 U.S. 589 (1988) (regular monitoring of religious organizations' use of federal funds did not create excessive entanglement); Agostini v. Felton, 521 U.S. 203 (1997) (unannounced monthly visits to monitor content taught by public employees in religious schools did not constitute excessive

entanglement). As applied specifically to Plaintiffs, the exemption is particularly noninvasive since Conestoga does not even qualify as a non-profit organization. As such, the government need not examine Plaintiffs' religion at all to determine that they do not qualify for the exemption.

The Supreme Court has consistently recognized that "[t]here is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'" Amos, 483 U.S. at 334 (quoting Walz, 397 U.S. at 669). Where, as here, a statute provides for general religious accommodations while avoiding discrimination among denominations and excessive government entanglement with religion, it is not prohibited by the Establishment Clause.

4. The Free Speech Clause

It is well established that the First Amendment, in addition to protecting the freedom to speak, prohibits compelled speech. W. Va. State Bd. of Educ. v. Barnette, 319 US. 624, 642 (1943) (law requiring recitation of the pledge of allegiance is unconstitutional). The right to be free from compelled speech also encompasses the right to refuse to fund speech with which one disagrees. United States v. United Foods, Inc., 533 U.S. 405, 410 (2001).

Plaintiffs argue that requiring them to purchase insurance that covers "patient education and

counseling for all women with reproductive capacity," which may include advice about abortifacients, improperly compels them to support speech with which they disagree. See HRSA Guidelines, supra. Defendants offer two responses: (1) the regulation concerns the provision of a health care plan, which is conduct rather than speech; and (2) the regulation is viewpoint neutral because it is silent as to the content of the education and counseling, leaving that decision instead to the patient and her doctor. Defendants emphasize that Plaintiffs remain free to discourage employees from using contraceptives which they believe to be immoral.

We agree with Defendants that Plaintiffs' Free Speech claim has little likelihood of success.[17]

As the district court observed in Autocam, this claim is materially identical to the one rejected by the Supreme Court in Rumsfeld v. Forum for Academic and Institutional Rights, 547 U.S. 47 (2006). In that case, the Court upheld a statute that conditioned federal funding to law schools upon their agreement to permit military recruiters on campus. The Court reasoned that the statute concerned conduct that was "not inherently expressive . . .

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[17] We also note that, as with Plaintiffs' Establishment Clause claim, every other court to consider the issue has found that it is unlikely that the regulations violate the right to free speech. See Grote Indus., LLC v. Sebelius, 2012 WL 6725905, at *9-10 (S.D. Ind. Dec. 27, 2012); Autocam Corp. v. Sebelius, No. 12-cv-1096, slip op. at 14-15 (W.D. Mich. Dec. 24, 2012); O'Brien, 2012 WL 4481208, at *11-13.

because the accommodation [of recruiters on campus] does not sufficiently interfere with any message of the school." Id. at 64. Importantly, the statute neither compelled the law schools to convey their support for the recruiters, nor prohibited them from expressing their disagreement. Id. at 64-65.

A similar analysis applies to the regulation challenged by Plaintiffs. The provision "affects what [Plaintiffs] must *do* . . . not what they may or may not say." Id. at 60 (emphasis in original). The conduct it requires of Plaintiffs—the purchase of certain health care coverage—is not inherently expressive. Purchasing a healthcare plan does not normally convey agreement with every medical procedure covered by the plan, or every health care decision made by a patient and her doctor. See Texas v. Johnson, 491 U.S. 397, 404 (1989) (conduct is inherently expressive when "[a]n intent to convey a particularized message was present, and . . . the likelihood was great that the message would be understood by those who viewed it." (quoting Spence v. State of Wash., 418 U.S. 405, 410-11 (1974))). Further, the regulations do not interfere with Plaintiffs' expression of their opinions regarding contraceptives. Like the law schools in Rumsfeld, Plaintiffs "remain free under the statute to express whatever views they may have on the [use of contraceptives]." Rumsfeld, 547 U.S. at 60.

The regulation challenged by Plaintiffs is further distinguishable from those invalidated in the Supreme Court's compelled-speech cases because it does not advocate any particular viewpoint. See, e.g.,

Barnette, 319 U.S. at 642; United Foods, 533 U.S. at 411 (the government may not "compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors . . .") (emphasis added). While the regulations mandate that employers provide coverage for "education and counseling" for women of reproductive capacity, which may include information about the contraceptives which Plaintiffs believe to be immoral, the regulations are silent as to the content of the counseling given to a patient by her doctor. See HRSA Guidelines, supra. The script that conversation follows is instead determined by the particular doctor and patient. See O'Brien, 2012 WL 4481208, at *12. As such, it cannot be said that Plaintiffs are being required to fund the advocacy of a viewpoint with which they disagree. Plaintiffs' concern that a doctor may, in some instances, provide advice to a patient that differs from the Hahns' religious beliefs is not one protected by the First Amendment.

IV. CONCLUSION

Plaintiffs have been unable to demonstrate a likelihood of success on the merits of their First Amendment and RFRA claims. As such, we need not decide whether Plaintiffs have demonstrated a right to relief under the other three preliminary injunction factors. Because Plaintiffs have not met their burden, Plaintiffs' motion will be denied.

An appropriate Order follows.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13-1144

CONESTOGA WOOD SPECIALTIES CORPORATION; NORMAN LEMAR HAHN; ANTHONY H. HAHN; ELIZABETH HAHN; KEVIN HAHN,

Appellants

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY UNITED STATES DEPARTMENT OF LABOR; SECRETARY UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY

SUR PETITION FOR REHEARING

Present: MCKEE, Chief Judge, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, and

COWEN*, Circuit Judges

The petition for rehearing filed by Appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied. Judge Jordan would have granted rehearing en banc for the reasons set forth in his dissenting Opinion. Judge Ambro, Judge Smith, Judge Fisher and Judge Hardiman would also have granted rehearing en banc.

BY THE COURT,

/s/ Robert E. Cowen
Circuit Judge

Dated: August 14, 2013
tmm/cc: all counsel of record

* Limited to Panel Rehearing Only

UNITED STATES COURT OF APPEALS
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No. 13-1144

CONESTOGA WOOD SPECIALTIES; NORMAN HAHN; NORMAN LEMAR HAHN; ANTHONY H. HAHN; ELIZABETH HAHN; KEVIN HAHN,

Appellants

SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY UNITED STATES DEPARTMENT OF LABOR; SECRETARY UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY

Argued May 30, 2013

BEFORE: JORDAN, VANASKIE and COWEN,
Circuit Judges

JUDGMENT

This cause came on to be considered on the record on appeal from the United States District Court for the Eastern District of Pennsylvania and was argued on May 30, 2013. On consideration whereof, it is hereby ORDERED and ADJUDGED by this Court that the judgment of the District Court entered on January 11, 2013, be and the same hereby is affirmed. All of the above in accordance with the opinion of this Court. Costs taxed against Appellants.

ATTEST:

/s/ Marcia M. Waldron
Clerk

DATED: July 26, 2013

Certified as a true copy and issued in lieu of a formal mandate on August 22, 2013

26 U.S.C. § 1361

(a) S corporation defined.–

(1) In general.--For purposes of this title, the term "S corporation" means, with respect to any taxable year, a small business corporation for which an election under section 1362(a) is in effect for such year.

(2) C corporation.--For purposes of this title, the term "C corporation" means, with respect to any taxable year, a corporation which is not an S corporation for such year.

(b) Small business corporation.–

(1) In general.--For purposes of this subchapter, the term "small business corporation" means a domestic corporation which is not an ineligible corporation and which does not--

(A) have more than 100 shareholders,

(B) have as a shareholder a person (other than an estate, a trust described in subsection (c)(2), or an organization described in subsection (c)(6)) who is not an individual,

(C) have a nonresident alien as a shareholder, and

(D) have more than 1 class of stock.

* * *

26 U.S.C. § 1362

(a) Election.–

(1) In general.--Except as provided in

subsection (g), a small business corporation may elect, in accordance with the provisions of this section, to be an S corporation.

(2) All shareholders must consent to election.--An election under this subsection shall be valid only if all persons who are shareholders in such corporation on the day on which such election is made consent to such election.

(b) When made.–

(1) In general.--An election under subsection (a) may be made by a small business corporation for any taxable year--

(A) at any time during the preceding taxable year, or

(B) at any time during the taxable year and on or before the 15th day of the 3d month of the taxable year.

* * *

(c) Years for which effective.--An election under subsection (a) shall be effective for the taxable year of the corporation for which it is made and for all succeeding taxable years of the corporation, until such election is terminated under subsection (d).

* * *

26 U.S.C. § 1363

(a) General rule.--Except as otherwise provided in this subchapter, an S corporation shall not be subject to the taxes imposed by this chapter.

(b) Computation of corporation's taxable income.--The taxable income of an S corporation shall be computed in the same manner as in the case of an individual, except that--

(1) the items described in section 1366(a)(1)(A) shall be separately stated,

(2) the deductions referred to in section 703(a)(2) shall not be allowed to the corporation,

(3) section 248 shall apply, and

(4) section 291 shall apply if the S corporation (or any predecessor) was a C corporation for any of the 3 immediately preceding taxable years.

* * *

26 U.S.C. § 4980D

(a) General rule.--There is hereby imposed a tax on any failure of a group health plan to meet the requirements of chapter 100 (relating to group health plan requirements).

(b) Amount of tax.–

(1) In general.--The amount of the tax imposed by subsection (a) on any failure shall be $100 for each day in the noncompliance period with respect to each individual to whom such failure relates.

(2) Noncompliance period.--For purposes of this section, the term "noncompliance period" means, with respect to any failure, the period--

(A) beginning on the date such failure first occurs, and

(B) ending on the date such failure is corrected.

* * *

26 U.S.C. § 4980H

(a) Large employers not offering health coverage.--If--

(1) any applicable large employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(2) at least one full-time employee of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee, then there is hereby imposed on the employer an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

(b) Large employers offering coverage with employees who qualify for premium tax credits or cost-sharing reductions.--

(1) In general.--If--

(A) an applicable large employer offers to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in

section 5000A(f)(2)) for any month, and

(B) 1 or more full-time employees of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee, then there is hereby imposed on the employer an assessable payment equal to the product of the number of full-time employees of the applicable large employer described in subparagraph (B) for such month and an amount equal to 1/12 of $3,000.

(2) Overall limitation.--The aggregate amount of tax determined under paragraph (1) with respect to all employees of an applicable large employer for any month shall not exceed the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

[**(3) Repealed.** Pub.L. 112-10, Div. B, Title VIII, § 1858(b)(4), Apr. 15, 2011, 125 Stat. 169]

(c) Definitions and special rules.--For purposes of this section--

(1) Applicable payment amount.--The term "applicable payment amount" means, with respect to any month, 1/12 of $2,000.

(2) Applicable large employer.--

(A) In general.--The term "applicable large employer" means, with respect to a calendar

year, an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year.

(B) Exemption for certain employers.—

(i) In general.--An employer shall not be considered to employ more than 50 full-time employees if--

(I) the employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and

(II) the employees in excess of 50 employed during such 120-day period were seasonal workers.

(ii) Definition of seasonal workers.--The term "seasonal worker" means a worker who performs labor or services on a seasonal basis as defined by the Secretary of Labor, including workers covered by section 500.20(s)(1) of title 29, Code of Federal Regulations and retail workers employed exclusively during holiday seasons.

(C) Rules for determining employer size.--For purposes of this paragraph--

(i) Application of aggregation rule for employers.--All persons treated as a single employer under sub-section (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as 1 employer.

(ii) Employers not in existence in preceding year.--In the case of an employer which was not in existence

throughout the preceding calendar year, the determination of whether such employer is an applicable large employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(iii) Predecessors.--Any reference in this subsection to an employer shall include a reference to any predecessor of such employer.

(D) Application of employer size to assessable penalties.--

(i) In general.--The number of individuals employed by an applicable large employer as full-time employees during any month shall be reduced by 30 solely for purposes of calculating--

(I) the assessable payment under subsection (a), or

(II) the overall limitation under subsection (b)(2).

(ii) Aggregation.--In the case of persons treated as 1 employer under subparagraph (C)(i), only 1 reduction under subclause (I) or (II) shall be allowed with respect to such persons and such reduction shall be allocated among such persons ratably on the basis of the number of full-time employees employed by each such person.

(E) Full-time equivalents treated as full-time employees.--Solely for purposes of determining whether an employer is an

applicable large employer under this paragraph, an employer shall, in addition to the number of full-time employees for any month otherwise determined, include for such month a number of full-time employees determined by dividing the aggregate number of hours of service of employees who are not fulltime employees for the month by 120.

(3) Applicable premium tax credit and cost-sharing reduction.--The term "applicable premium tax credit and cost-sharing reduction" means--

(A) any premium tax credit allowed under section 36B,

(B) any cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act, and

(C) any advance payment of such credit or reduction under section 1412 of such Act.

(4) Full-time employee.--

(A) In general.--The term "full-time employee" means, with respect to any month, an employee who is employed on average at least 30 hours of service per week.

(B) Hours of service.--The Secretary, in consultation with the Secretary of Labor, shall prescribe such regulations, rules, and guidance as may be necessary to determine the hours of service of an employee, including rules for the application of this paragraph to employees who are not compensated on an hourly basis.

(5) Inflation adjustment.--

(A) In general.--In the case of any calendar year after 2014, each of the dollar amounts in subsection (b) and paragraph (1) shall be increased by an amount equal to the product of--

(i) such dollar amount, and

(ii) the premium adjustment percentage (as defined in section 1302(c)(4) of the Patient Protection and Affordable Care Act) for the calendar year.

(B) Rounding.--If the amount of any increase under subparagraph (A) is not a multiple of $10, such increase shall be rounded to the next lowest multiple of $10.

(6) Other definitions.--Any term used in this section which is also used in the Patient Protection and Affordable Care Act shall have the same meaning as when used in such Act.

(7) Tax nondeductible.--For denial of deduction for the tax imposed by this section, see section 275(a)(6).

(d) Administration and procedure.--

(1) In general.--Any assessable payment provided by this section shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) Time for payment.--The Secretary may provide for the payment of any assessable payment provided by this section on an annual, monthly, or other periodic basis as the Secretary may prescribe.

(3) Coordination with credits, etc.--The

Secretary shall prescribe rules, regulations, or guidance for the repayment of any assessable payment (including interest) if such payment is based on the allowance or payment of an applicable premium tax credit or cost-sharing reduction with respect to an employee, such allowance or payment is subsequently disallowed, and the assessable payment would not have been required to be made but for such allowance or payment.

29 U.S.C. § 1132

(a) Persons empowered to bring a civil action
A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the
plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or

beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;
(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;
(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), (7), (8), or (9) of subsection
(c) of this section or under subsection (i) or (l) of this section;
(7) by a State to enforce compliance with a qualified medical child support order (as defined in section
1169(a)(2)(A) of this title);
(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection;
(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary

at the time of the alleged violation,
or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts; or

(10) in the case of a multiemployer plan that has been certified by the actuary to be in endangered or critical status under section 1085 of this title, if the plan sponsor--

(A) has not adopted a funding improvement or rehabilitation plan under that section by the deadline established in such section, or

(B) fails to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section, by an employer that has an obligation to contribute with respect to the multiemployer plan or an employee organization that represents active participants in the multiemployer plan, for an order compelling the plan sponsor to adopt a funding improvement or rehabilitation plan or to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section and the funding improvement or rehabilitation plan.

* * *

42 U.S.C. § 300gg-13

(a) In general

A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for--

(1) evidence-based items or services that have in effect a rating of " A" or "B" in the current recommendations of the United States Preventive Services Task Force;

(2) immunizations that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved; and

(3) with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration.

(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

(5) for the purposes of this chapter, and for the purposes of any other provision of law, the current recommendations of the United States Preventive Service Task Force regarding breast cancer screening, mammography, and prevention shall be considered the most current other than

those issued in or around November 2009.

Nothing in this subsection shall be construed to prohibit a plan or issuer from providing coverage for services in addition to those recommended by United States Preventive Services Task Force or to deny coverage for services that are not recommended by such Task Force.

* * *

42 U.S.C. § 2000bb

(a) Findings

The Congress finds that--

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental

interests.

(b) Purposes

The purposes of this chapter are--

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb-1

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this

section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. § 2000bb-2

As used in this chapter--
(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;
(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;
(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and
(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

42 U.S.C. § 2000bb-3

(a) In general
This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.
(b) Rule of construction
Federal statutory law adopted after November 16, 1993 is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.
(c) Religious belief unaffected
Nothing in this chapter shall be construed to authorize any government to burden any religious

belief.

42 U.S.C. § 2000cc-5

In this chapter:

* * *

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

* * *

42 U.S.C. § 18011

(a) No changes to existing coverage

(1) In general

Nothing in this Act (or an amendment made by this Act) shall be construed to require that an individual terminate coverage under a group health plan or health insurance coverage in which such individual was enrolled on March 23, 2010.

(2) Continuation of coverage

Except as provided in paragraph (3), with respect to a group health plan or health insurance coverage in which an individual was enrolled on March 23, 2010, this subtitle and subtitle A (and the amendments made by such subtitles) shall not apply to such plan or coverage, regardless of whether the individual

renews such coverage after March 23, 2010.

* * *

(e) Definition
In this title, the term "grandfathered health plan" means any group health plan or health insurance coverage to which this section applies.

15 Pa. C.S.A. § 1501

Except as provided in section 103 (relating to subordination of title to regulatory laws), a business corporation shall have the legal capacity of natural persons to act.

45 C.F.R. § 147.130

(a) Services–

(1) In general. Beginning at the time described in paragraph (b) of this section and subject to § 147.131, a group health plan, or a health insurance issuer offering group or individual health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) Evidence-based items or services that have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual involved (except as otherwise provided in paragraph (c) of this section);

* * *

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration.

(A) In developing the binding health plan coverage guidelines specified in this paragraph (a)(1)(iv), the Health Resources and Services Administration

shall be informed by evidence and may establish exemptions from such guidelines with respect to group health plans established or maintained by religious employers and health insurance coverage provided in connection with group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services under such guidelines.

(B) For purposes of this subsection, a "religious employer" is an organization that meets all of the following criteria:

(1) The inculcation of religious values is the purpose of the organization.

(2) The organization primarily employs persons who share the religious tenets of the organization.

(3) The organization serves primarily persons who share the religious tenets of the organization.

(4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

* * *

(d) Applicability date. The provisions of this section apply for plan years (in the individual market, for policy years) beginning on or after

September 23, 2010. See § 147.140 of this Part for determining the application of this section to grandfathered health plans (providing that these rules regarding coverage of preventive health services do not apply to grandfathered health plans).

45 C.F.R. § 147.131

(a) Religious employers. In issuing guidelines under § 147.130(a)(1)(iv), the Health Resources and Services Administration may establish an exemption from such guidelines with respect to a group health plan established or maintained by a religious employer (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer) with respect to any requirement to cover contraceptive services under such guidelines. For purposes of this paragraph (a), a "religious employer" is an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

(b) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974.

(c) Contraceptive coverage--insured group health plans--

(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in paragraph (b)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(2) Payments for contraceptive services--

(i) A group health insurance issuer that receives a copy of the self-certification

described in paragraph **(b)(4)** of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 147.130(a)(1)(iv) must--

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 147.130(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act. If the group health plan of the eligible organization provides

coverage for some but not all of any contraceptive services required to be covered under § 147.130(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

* * *

77 Fed. Reg. 8725

Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act
AGENCIES: Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; Centers for Medicare & Medicaid Services, Department of Health and Human Services.

ACTION: Final rules.

SUMMARY: These regulations finalize, without change, interim final regulations authorizing the exemption of group health plans and group health insurance coverage sponsored by certain religious employers from having to cover certain preventive health services under provisions of the Patient Protection and Affordable Care Act.

DATES: Effective date. These final regulations are effective on April 16, 2012.

Applicability dates. These final regulations generally apply to group health plans and group health insurance issuers on April 16, 2012.

FOR FURTHER INFORMATION CONTACT: Amy Turner or Beth Baum, Employee Benefits Security Administration (EBSA), Department of Labor, at (202) 693-8335; Karen Levin, Internal Revenue Service, Department of the Treasury, at (202) 622-6080; Robert Imes, Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS), at (410) 786-1565.

Customer Service Information: Individuals interested in obtaining information from the Department of Labor concerning employment-based health coverage laws may call the EBSA Toll-Free Hotline at 1-866-444-EBSA (3272) or visit the Department of Labor's Web site (http://www.dol.gov/ebsa). In addition, information from HHS on private health insurance for consumers can be found on the CMS Web site (http://cciio.cms.gov), and on health reform can be found at http://www.HealthCare.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The Patient Protection and Affordable Care Act, Public Law 111-148, was enacted on March 23, 2010; the Health Care and Education Reconciliation Act of 2010, Public Law 111-152, was enacted on March 30, 2010 (collectively, the Affordable Care Act). The Affordable Care Act reorganizes, amends, and adds

to the provisions of part A of title XXVII of the Public Health Service Act (PHS Act) relating to group health plans and health insurance issuers in the group and individual markets. The Affordable Care Act adds section 715(a)(1) to the Employee Retirement Income Security Act (ERISA) and section 9815(a)(1) to the Internal Revenue Code (Code) to incorporate the provisions of part A of title XXVII of the PHS Act into ERISA and the Code, and make them applicable to group health plans.

Section 2713 of the PHS Act, as added by the Affordable Care Act and incorporated into ERISA and the Code, requires that non-grandfathered group health plans and health insurance issuers offering group or individual health insurance coverage provide benefits for certain preventive health services without the imposition of cost sharing. These preventive health services include, with respect to women, preventive care and screening provided for in the comprehensive guidelines supported by the Health Resources and Services Administration (HRSA) that were issued on August 1, 2011 (HRSA Guidelines)[1]. As relevant here, the HRSA Guidelines require coverage, without cost sharing, for "[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity," as prescribed by a provider. Except as discussed below, non-grandfathered group health plans and health insurance issuers are

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[1] The HRSA Guidelines can be found at: http://www.hrsa.gov/womensguidelines.

required to provide coverage consistent with the HRSA Guidelines, without cost sharing, in plan years (or, in the individual market, policy years) beginning on or after August 1, 2012.[2] These guidelines were based on recommendations of the independent Institute of Medicine, which undertook a review of the evidence on women's preventive services.

The Departments of Health and Human Services, Labor, and the Treasury (the Departments) published interim final regulations implementing PHS Act section 2713 on July 19, 2010 (75 FR 41726). In the preamble to the interim final regulations, the Departments explained that HRSA was developing guidelines related to preventive care and screening for women that would be covered without cost sharing pursuant to PHS Act section 2713(a)(4), and that these guidelines were expected to be issued no later than August 1, 2011. Although comments on the anticipated guidelines were not requested in the interim final regulations, the Departments received considerable feedback regarding which preventive services for women should be covered without cost sharing. Some commenters, including some religiously-affiliated employers, recommended that these guidelines

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[2] The interim final regulations published by the Departments on July 19, 2010, generally provide that plans and issuers must cover a newly recommended preventive service starting with the first plan year (or, in the individual market, policy year) that begins on or after the date that is one year after the date on which the new recommendation or guideline is issued. 26 CFR 54.9815-2713T(b)(1); 29 CFR 2590.715-2713(b)(1); 45 CFR 147.130(b)(1).

include contraceptive services among the recommended women's preventive services and that the attendant coverage requirement apply to all group health plans and health insurance issuers. Other commenters, however, recommended that group health plans sponsored by religiously-affiliated employers be allowed to exclude contraceptive services from coverage under their plans if the employers deem such services contrary to their religious tenets, noting that some group health plans sponsored by organizations with a religious objection to contraceptives currently contain such exclusions for that reason.

In response to these comments, the Departments amended the interim final regulations to provide HRSA with discretion to establish an exemption for group health plans established or maintained by certain religious employers (and any group health insurance coverage provided in connection with such plans) with respect to any requirement to cover contraceptive services that they would otherwise be required to cover without cost sharing consistent with the HRSA Guidelines. The amended interim final regulations were issued and effective on August 1, 2011.[3] The amended interim final regulations specified that, for purposes of this exemption, a religious employer is one that: (1) Has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization

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[3] The amendment to the interim final regulations was published on August 3, 2011, at 76 FR 46621.

described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Code. Section 6033(a)(3)(A)(i) and (iii) of the Code refers to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order. In the HRSA Guidelines, HRSA exercised its discretion under the amended interim final regulations such that group health plans established and maintained by these religious employers (and any group health insurance coverage provided in connection with such plans) are not required to cover contraceptive services.

In the preamble to the amended interim final regulations, the Departments explained that it was appropriate that HRSA take into account the religious beliefs of certain religious employers where coverage of contraceptive services is concerned. The Departments noted that a religious exemption is consistent with the policies in some States that currently both require contraceptive services coverage under State law and provide for some type of religious exemption from their contraceptive services coverage requirement. Comments were requested on the amended interim final regulations, specifically with respect to the definition of religious employer, as well as alternative definitions.

* * *

III. Overview of the Final Regulations

In response to these comments, the Departments carefully considered whether to eliminate the

religious employer exemption or to adopt an alternative definition of religious employer, including whether the exemption should be extended to a broader set of religiously-affiliated sponsors of group health plans and group health insurance coverage. For the reasons discussed below, the Departments are adopting the definition in the amended interim final regulations for purposes of these final regulations while also creating a temporary enforcement safe harbor, discussed below. During the temporary enforcement safe harbor, the Departments plan to develop and propose changes to these final regulations that would meet two goals—providing contraceptive coverage without cost-sharing to individuals who want it and accommodating non-exempted, non-profit organizations' religious objections to covering contraceptive services as also discussed below.

PHS Act section 2713 reflects a determination by Congress that coverage of recommended preventive services by non-grandfathered group health plans and health insurance issuers without cost sharing is necessary to achieve basic health care coverage for more Americans. Individuals are more likely to use preventive services if they do not have to satisfy cost sharing requirements (such as a copayment, coinsurance, or a deductible). Use of preventive services results in a healthier population and reduces health care costs by helping individuals avoid preventable conditions and receive treatment

earlier.[4] Further, Congress, by amending the Affordable Care Act during the Senate debate to ensure that recommended preventive services for women are covered adequately by non-grandfathered group health plans and group health insurance coverage, recognized that women have unique health care needs and burdens. Such needs include contraceptive services.[5]

* * *

The religious employer exemption in the final regulations does not undermine the overall benefits described above. A group health plan (and health insurance coverage provided in connection with such a plan) qualifies for the exemption if, among other qualifications, the plan is established and maintained by an employer that primarily employs persons who share the religious tenets of the organization. As such, the employees of employers availing themselves of the exemption would be less likely to use contraceptives even if contraceptives were covered under their health plans.

A broader exemption, as urged by some commenters, would lead to more employees having to pay out of

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[4] Inst. of Med., Clinical Preventive Services for Women: Closing the Gaps, Wash., DC: Nat'l Acad. Press, 2011, at p. 16.

[5] Inst. of Med., Clinical Preventive Services for Women: Closing the Gaps, Wash. DC: Nat'l Acad. Press, 2011, at p. 9; see also Sonfield, A., The Case for Insurance Coverage of Contraceptive Services and Supplies Without Cost Sharing, 14 Guttmacher Pol'y Rev. 10 (2011), available at http://www.guttmacher.org/pubs/gpr/14/1/gpr140107.html.

pocket for contraceptive services, thus making it less likely that they would use contraceptives, which would undermine the benefits described above. Employers that do not primarily employ employees who share the religious tenets of the organization are more likely to employ individuals who have no religious objection to the use of contraceptive services and therefore are more likely to use contraceptives. Including these employers within the scope of the exemption would subject their employees to the religious views of the employer, limiting access to contraceptives, and thereby inhibiting the use of contraceptive services and the benefits of preventive care.

The Departments note that this religious exemption is intended solely for purposes of the contraceptive services coverage requirement pursuant to PHS Act section 2713 and the companion provisions of ERISA and the Code.

The Departments also note that some group health plans sponsored by employers that do not satisfy the definition of religious employer in these final regulations may be grandfathered health plans[15] and thus are not subject to any of the preventive services coverage requirements of section 2713 of the PHS Act, including the contraceptive coverage requirement.

With respect to certain non-exempted, non-profit

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[15] See section 1251 of the Affordable Care Act and its implementing regulations at 26 CFR 54.9815-1251T; 29 CFR 2590.715-1251; 45 CFR 147.140.

organizations with religious objections to covering contraceptive services whose group health plans are not grandfathered health plans, guidance is being issued contemporaneous with these final regulations that provides a one-year safe harbor from enforcement by the Departments.

Before the end of the temporary enforcement safe harbor, the Departments will work with stakeholders to develop alternative ways of providing contraceptive coverage without cost sharing with respect to non-exempted, non-profit religious organizations with religious objections to such coverage. Specifically, the Departments plan to initiate a rulemaking to require issuers to offer insurance without contraception coverage to such an employer (or plan sponsor) and simultaneously to offer contraceptive coverage directly to the employer's plan participants (and their beneficiaries) who desire it, with no cost-sharing. Under this approach, the Departments will also require that, in this circumstance, there be no charge for the contraceptive coverage. Actuaries and experts have found that coverage of contraceptives is at least cost neutral when taking into account all costs and benefits in the health plan.[16] The Departments

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[16] Bertko, John, F.S.A., M.A.A.A., Director of Special Initiatives and Pricing in the Center for Consumer Information and Insurance Oversight at the Centers for Medicare and Medicaid Services, Glied, Sherry, Ph.D., Assistant Secretary for Planning and Evaluation, U.S. Department of Health & Human Services (ASPE/HHS), Miller, Erin, MPH, (ASPE/HHS), Wilson, Lee, (ASPE/HHS), Simmons, Adelle, (ASPE/HHS), "The Cost of Covering Contraceptives through Health Insurance," (9 February 2012), available at: http://

intend to develop policies to achieve the same goals for self-insured group health plans sponsored by non-exempted, non-profit religious organizations with religious objections to contraceptive coverage.

A future rulemaking would be informed by the existing practices of some issuers and religious organizations in the 28 States where contraception coverage requirements already exist, including Hawaii. There, State health insurance law requires issuers to offer plan participants in group health plans sponsored by religious employers that are exempt from the State contraception coverage requirement the option to purchase this coverage in a way that religious employers are not obligated to fund it. It is our understanding that, in practice, rather than charging employees a separate fee, some issuers in Hawaii offer this coverage to plan participants at no charge. The Departments will work with stakeholders to propose and finalize this policy before the end of the temporary enforcement safe harbor.

* * *

IV. Statutory Authority

The Department of the Treasury final regulations are adopted pursuant to the authority contained in sections 7805 and 9833 of the Code.

The Department of Labor final regulations are adopted pursuant to the authority contained in 29

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aspe.hhs.gov/health/reports/2012/contraceptives/ib.shtml.

U.S.C. 1027, 1059, 1135, 1161-1168, 1169, 1181-1183, 1181 note, 1185, 1185a, 1185b, 1185c, 1185d, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Public Law104-191, 110 Stat. 1936; sec. 401(b), Public Law 105-200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 512(d), Public Law 110-343, 122 Stat. 3881; sec. 1001, 1201, and 1562(e), Public Law 111-148, 124 Stat. 119, as amended by Public Law 111-152, 124 Stat. 1029; Secretary of Labor's Order 3-2010, 75 FR 55354 (September 10, 2010).

The Department of Health and Human Services final regulations are adopted pursuant to the authority contained in sections 2701 through 2763, 2791, and 2792 of the PHS Act (42 USC 300gg through 300gg-63, 300gg-91, and 300gg-92), as amended.

* * *

26 CFR Chapter I

Accordingly, 26 CFR part 54 is amended as follows:

PART 54—PENSION EXCISE TAXES

Paragraph 1. The authority citation for part 54 is amended by adding an entry for § 54.9815-2713 in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805. * * *

Section 54.9815-2713 also issued under 26 U.S.C. 9833. * * *

26 CFR § 54.9815-2713T

Par. 2. Section 54.9815-2713T is amended in paragraph (a)(1)(iii) by removing "; and" and adding a period in its place, and by removing paragraph (a)(1)(iv).

26 CFR § 54.9815-2713
Par. 3. Section 54.9815-2713 is added to read as follows:

26 CFR § 54.9815-2713
§ 54.9815-2713 Coverage of preventive health services.
*8730 (a) Services—(1) In general. [Reserved]
(i) [Reserved]
(ii) [Reserved]
(iii) [Reserved]
(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of § 54.9815-2713T, preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration and developed in accordance with 45 CFR 147.130(a)(1)(iv).
(2) Office visits. [Reserved]
(3) Out-of-network providers. [Reserved]
(4) Reasonable medical management. [Reserved]
(5) Services not described. [Reserved]
(b) Timing. [Reserved]
(c) Recommendations not current. [Reserved]
(d) Effective/applicability date. April 16, 2012.
DEPARTMENT OF LABOR
Employee Benefits Security Administration
29 CFR Chapter XXV
29 CFR part 2590 is amended as follows:
PART 2590—RULES AND REGULATIONS FOR GROUP HEALTH PLANS
1. The authority citation for part 2590 continues to read as follows:
Authority: 29 U.S.C. 1027, 1059, 1135, 1161-1168,

1169, 1181-1183, 1181 note, 1185, 1185a, 1185b, 1185c, 1185d, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Public Law 104-191, 110 Stat. 1936; sec. 401(b), Public Law 105-200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 512(d), Public Law 110-343, 122 Stat. 3881; sec. 1001, 1201, and 1562(e), Public Law 111-148, 124 Stat. 119, as amended by Public Law 111-152, 124 Stat. 1029; Secretary of Labor's Order 3-2010, 75 FR 55354 (September 10, 2010).

29 CFR § 2590.715-2713

2. Accordingly, the amendment to the interim final rule with comment period amending 29 CFR 2590.715-2713(a)(1)(iv) which was published in the Federal Register at 76 FR 46621-46626 on August 3, 2011, is adopted as a final rule without change.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Subtitle A

PART 147—HEALTH INSURANCE REFORM REQUIREMENTS FOR THE GROUP AND INDIVIDUAL HEALTH INSURANCE MARKETS

1. The authority citation for part 147 continues to read as follows:

Authority: 2701 through 2763, 2791, and 2792 of the Public Health Service Act (42 U.S.C. 300gg through 300gg-63, 300gg-91, and 300gg-92), as amended.

45 CFR § 147.130

2. Accordingly, the amendment to the interim final rule with comment period amending 45 CFR 147.130(a)(1)(iv) which was published in the Federal Register at 76 FR 46621-46626 on August 3, 2011, is

adopted as a final rule without change.

Steven T. Miller,
Deputy Commissioner for Services and Enforcement, Internal Revenue Service.
Approved: February 10, 2012.

Emily S. McMahon,
Acting Assistant Secretary of the Treasury (Tax Policy).
Signed this 10th day, of February 2012.

Phyllis C. Borzi,
Assistant Secretary, Employee Benefits Security Administration, Department of Labor.
Dated: February 10, 2012.

Marilyn Tavenner,
Acting Administrator, Centers for Medicare & Medicaid Services.
Dated: February 10, 2012.

Kathleen Sebelius,
Secretary, Department of Health and Human Services.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 5:12-CV-06744-MSG

CONESTOGA WOOD SPECIALITIES CORPORATION, a PA Corporation;
NORMAN HAHN;
ELIZABETH HAHN;
NORMAN LEMAR HAHN;
ANTHONY H. HAHN; and
KEVIN HAHN

Plaintiffs,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services;
HILDA SOLIS, in her official capacity as Secretary of the United States Department of Labor;
TIMOTHY GEITHNER, in his official capacity as Secretary of the United States Department of the Treasury;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
UNITED STATES DEPARTMENT OF LABOR; and

UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.

FIRST AMENDED VERIFIED COMPLAINT

Plaintiffs, Conestoga Wood Specialties Corporation, a Pennsylvania corporation, Norman Hahn, Elizabeth Hahn, Norman Lemar Hahn, Anthony H. Hahn and Kevin Hahn (herein "Conestoga" or collectively, with the Hahns, the "Plaintiffs") by and through their attorneys, Charles W. Proctor, III, and Randall L. Wenger, state as follows:

NATURE OF THE CASE

1. In this action, the Plaintiffs seek declaratory and injunctive relief for the Defendants' violations of the Religious Freedom Restoration Act 42 U.S.C. § 2000bb *et seq.* (RFRA), the First and Fifth Amendments to the United States Constitution, and the Administrative Procedure Act, 5 U.S.C. § 701, et seq. (APA), by Defendants' actions in implementing the Patient Protection and Affordable Care Act of 201 0 (Pub. L. 111-148 (March 23, 2010), and Pub. L. 111-152 (March 30, 2010) (hereinafter "PPACA"), in ways that coerce the Plaintiffs and thousands of other conscientious individuals and entities and to engage in acts they consider sinful and immoral in violation of their most deeply held religious beliefs.

2. Plaintiffs Norman Hahn, Elizabeth Hahn, Norman Lemar Hahn, Anthony H. Hahn, and Kevin Hahn (hereinafter "the Hahns") are practicing and believing Mennonite Christians. They own and operate Conestoga Wood Specialties Corporation, a Pennsylvania corporation, located at 245 Reading Road, East Earl, PA 17519 (hereinafter "Conestoga"), a wood cabinet and specialty products manufacturer, and they seek to operate Conestoga in a manner that reflects their sincerely held religious beliefs. The Hahns, based upon these sincerely held religious beliefs as formed by the moral teachings of their Mennonite Christian beliefs, believe that God requires respect for the sanctity of human life.

3. Applying this religious faith and the moral teachings of the Mennonite faith, the Hahns have concluded that it would be sinful and immoral for them to intentionally participate in, pay for, facilitate, or otherwise support any contraception with an abortifacient effect through health insurance coverage they offer at Conestoga. As a consequence, the Hahns provide health insurance benefits to their employees that omits such coverage of abortifacient drugs. The Hahns' plan renews each year on January 1, the next renewal date thus occurring on January 1, 2013, creating the very real potential for harm to the Plaintiff's and their sincerely held religious beliefs if forced to include such coverage.

4. With full knowledge that many religious citizens hold the same or similar beliefs, on February 15, 2012 the Defendants finalized rules through the Departments of HHS, Labor and Treasury (those

rules collectively referred to hereinafter as the "Preventive Services Mandate" or the "Mandate"[1]) that force Plaintiffs to pay for and otherwise facilitate the insurance coverage and use of contraception with an abortifacient effect and related education and counseling. This Mandate applies to Plaintiffs solely because they wish to operate their business in the United States of America.

5. Similarly to other religious groups and entities organized by people of faith, the Hahns believe that compliance with Defendants' Mandate would require them to violate their deeply held

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[1] The Mandate consists of a conglomerate of authorities, including: "Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act," 77 Fed. Reg. 8725-30 (Feb. 15, 2012); the prior interim final rule found at 76 Fed. Reg. 46621-26 (Aug. 3, 2011) which the Feb. 15 rule adopted "without change"; the guidelines by Defendant HHS's Health Resources and Services Administration (HRSA), http://www.hrsa.gov/womensguidelines/, mandating that health plans include no-cost-sharing coverage of "All Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity" as part of required women's "preventive care"; regulations issued by Defendants in 2010 directing HRSA to develop those guidelines, 75 Fed. Reg. 41726 (July 19, 2010); the statutory authority found in 42 U.S.C. § 300gg-13(a)(4) requiring unspecified preventive health services generally, to the extent Defendants have used it to mandate coverage to which Plaintiffs and other employers have religious objections; penalties existing throughout the United States Code for noncompliance with these requirements; and other provisions of PPACA or its implementing regulations that affect exemptions or other aspects of the Mandate.

religious beliefs as exemplified by the moral teachings of the Mennonite Church. The Mandate illegally and unconstitutionally coerces the Plaintiffs to violate their sincerely held religious beliefs under threat of heavy fines and penalties. The Mandate also forces the Plaintiffs to fund government dictated speech that is directly at odds with the religious ethics derived from their deeply held religious beliefs and the moral teachings of the Mennonite Faith that they strive to embody in their business. Defendants' coercion tramples on the freedom of conscience of Plaintiffs and millions of other Americans to abide by their religious convictions, to comply with moral imperatives they believe are decreed by God Himself, and to contribute to society through their business in a way that is consistent with their religious ethics, deeply held religious beliefs, and the moral teachings of the Mennonite Church.

6. Defendants' refusal to accommodate the conscience of the Plaintiffs is highly selective. PPACA exempts a variety of health plans from the Mandate, and upon information and belief the government has provided thousands of exemptions from the PPACA for various entities such as large corporations. But Defendants' Mandate does not exempt Plaintiffs' plan or those of many other religious Americans.

7. Defendants' actions violate the Plaintiffs' right freely to exercise religion, protected by the Religious Freedom Restoration Act and the Religion Clauses of the First Amendment to the United States Constitution.

8. Defendants' actions also violate the Plaintiffs' right to the freedom of speech, as secured by the Free Speech Clause of the First Amendment to the United States Constitution, and their due process rights secured by the Fifth Amendment to the United States Constitution.

9. Additionally, Defendants violated the Administrative Procedure Act, 5 U.S.C. § 553, by imposing the Mandate without prior notice or public comment, and for other reasons.

10. Plaintiffs are faced with imminent harm due to Defendants' Mandate. The Mandate by its terms forces Plaintiffs to obtain and pay for insurance coverage of the objectionable items in their January 1, 2013 plan. Plaintiffs therefore will suffer irreparable harm on or before January 1, 2013, unless the Court enters declaratory and injunctive relief to protect Plaintiffs from Defendants' deliberate attack on their consciences and religious freedoms which would result from forced compliance with the Mandate.

IDENTIFICATION OF PARTIES

11. Conestoga Wood Specialties Corporation, a Pennsylvania corporation (herein after referred to as "Conestoga"), doing business at 245 Reading Road, East Earl, Pennsylvania, is a wholly owned family business that manufactures wood cabinets and wood specialty products. It is owned and operated as a privately held corporation principally by Plaintiffs Norman Hahn, Elizabeth Hahn, Norman Lemar

Hahn, Anthony H. Hahn, and Kevin Hahn, the founder and his wife and sons respectively, who currently manage the business. Together they exercise sole ownership of and management responsibility for Conestoga.

12. Plaintiff Norman Hahn, is a shareholder of Plaintiff Conestoga, a member of the Conestoga Board of Directors, and serves as Vice President of the Board.

13. Plaintiff Elizabeth Hahn, is a shareholder of Plaintiff Conestoga and is a member of the Board of Directors.

14. Plaintiff Norman Lemar Hahn is a shareholder of Plaintiff Conestoga and is Chairman of the Board of Directors.

15. Plaintiff Anthony H. Hahn is a shareholder of Plaintiff Conestoga and is a member of the Board of Directors and President and Chief Executive Officer.

16. Plaintiff Kevin Hahn is a shareholder of Plaintiff Conestoga and is a member of the Board of Directors.

17. By virtue of their ownership, directorship and officer positions, the Hahn's are responsible for implementing Conestoga's compliance with Defendants' Mandate.

18. Defendants are appointed officials of the United States government and United States

Executive Branch agencies responsible for issuing and enforcing the Mandate.

19. Defendant Kathleen Sebelius is the Secretary of the United States Department of Health and Human Services (HHS). In this capacity, she has responsibility for the operation and management of HHS. Sebelius is sued in her official capacity only.

20. Defendant HHS is an executive agency of the United States government and is responsible for the promulgation, administration and enforcement of the Mandate.

21. Defendant Hilda Solis is the Secretary of the United States Department of Labor. In this capacity, she has responsibility for the operation and management of the Department of Labor. Solis is sued in her official capacity only.

22. Defendant Department of Labor is an executive agency of the United States government and is responsible for the promulgation, administration, and enforcement of the Mandate.

23. Defendant Timothy Geithner is the Secretary of the Department of the Treasury. In this capacity, he has responsibility for the operation and management of the Department. Geithner is sued in his official capacity only.

24. Defendant Department of Treasury is an executive agency of the United States government and is responsible for the promulgation, administration,

and enforcement of the Mandate.

JURISDICTION AND VENUE

25. This action arises under the Constitution and laws of the United States. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 & 1361, jurisdiction to render declaratory and injunctive relief under 28 U.S.C. §§ 2201 & 2202, 42 U.S.C. § 2000bb-1, 5 U.S.C. § 702, and Fed. R. Civ. P. 65, and to award reasonable attorney's fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412, and 42 U.S.C. § 1988.

26. Venue lies in this district pursuant to 28 U.S.C. § 1391(e). A substantial part of the events or omissions giving rise to the claim occurred in this district, and the Plaintiffs are located in this district.

FACTUAL ALLEGATIONS

I. The Hahns' Religious Beliefs and Operation of Conestoga

27. The Hahns are practicing and believing Mennonite Christians.

28. They strive to follow Mennonite ethical beliefs and religious and moral teachings throughout their lives, including in their operation of Conestoga.

29. The Hahns sincerely believe that the Mennonite faith does not allow them to violate Mennonite religious and moral teachings in their

decisions operating Conestoga. They believe that according to the Mennonite faith their operation of Conestoga must be guided by ethical social principles and Mennonite religious and moral teachings, that the adherence of their business practice according to such Mennonite ethics and religious and moral teachings is a genuine calling from God, that their Mennonite faith prohibits them from separating their religious beliefs from their daily business practice, and that their Mennonite faith requires them to integrate the gifts of the spiritual life, the virtues, morals, and ethical and social principles of Mennonite teaching into their life and work.

30. The Mennonite Church teaches that taking of life which includes anything that terminates a fertilized embryo is intrinsic evil and a sin against God to which they are held accountable. Therefore, abortion and any abortifacient contraception that may cause an abortion is equally objectionable to the Plaintiff.

31. As a matter of religious faith the Hahns believe that these Mennonite teachings are among the religious ethical teachings they must follow throughout their lives including in their business practice.

32. Consequently, the Hahns believe that it would be immoral and sinful for them to intentionally participate in, pay for, facilitate, or otherwise support abortifacient drugs, contraception with an abortifacient effect, and related education

and counseling, as would be required by the Mandate, through their inclusion in health insurance coverage offered by Conestoga.

33. Conestoga's mission statement includes the commitment that "We operate in a professional environment founded upon the highest ethical, moral, and Christian principles reflecting respect, support, and trust for our customers, our suppliers, our employees and their families."

34. The Hahns have always operated Conestoga in accordance with their Mennonite beliefs including but not limited to the structuring of their health insurance plan.

35. As a result of their deeply held beliefs both Conestoga and the Hahn's make substantial contributions to a variety of charitable and community organizations every year above and beyond their giving to the individual churches they attend.

II. Conestoga's Health Insurance Plan

36. As part of fulfilling their vision and mission statement and religious beliefs and commitments, Plaintiffs provide generous health insurance for their employees.

37. Conestoga has approximately 950 full-time employees throughout its various locations in the United States.

38. The health insurance plan year for Conestoga begins on January 1 of each year, with the next plan year starting on January 1, 2013.

39. The health insurance plan that will be effective January 1, 2013 provides for abortifacient drugs and contraception with an abortifacient effect.

40. To implement the plan for the new year beginning January 1, 2013, and/or make substantial plan changes as a result of the Mandate, Plaintiffs must make logistical arrangements on or before December 31, 2012 in order for the plan to be arranged, reviewed, finalized and communicated to employees prior to the plan year's January 1, 2013 start date.

III. The PPACA and Defendants' Mandate Thereunder

41. Under the PPACA, employers with over 50 full-time employees are required to provide a certain minimum level of health insurance to their employees.

42. Nearly all such plans must include "preventive services," which must be offered with no cost-sharing by the employee.

43. On February 10, 2012, the Department of Health and Human Services finalized a rule (previously referred to in this Complaint as the Mandate) that imposes a definition of preventive services to include all FDA approved "contraceptive"

drugs, surgical sterilization, and education and counseling for such services.

44. This final rule was adopted without giving due weight to the tens of thousands of public comments submitted to HHS in opposition to the Mandate.

45. In the category of "FDA approved contraceptives" included in this Mandate are several drugs or devices that may cause the demise of an already conceived but not yet attached human embryo, such as "emergency contraception" or "Plan B" drugs (the so called "morning after" pill).

46. The FDA approved in this same category a drug called "ella" (the so called "week after" pill), which studies show can function to kill embryos even after they have attached to the uterus, by a mechanism similar to the abortion drug RU-486.

47. The manufacturers of some such drugs, methods and devices in the category of "FDA approved contraceptive methods" indicate that they can function to cause the demise of an early human embryo.

48. The Mandate also requires group health care plans to pay for the provision of counseling, education, and other information concerning contraception (including devices and drugs such as "Plan B" and "ella" that cause early abortions or harm to human embryos) for all women beneficiaries who are capable of bearing children.

49. The Mandate applies to the first health insurance plan year beginning after August 1, 2012.

50. Thus Plaintiffs are, absent relief from this Court, subject to the Mandate's requirement of coverage of the above described items starting with Conestoga's January 1, 2013 plan.

51. The Mandate makes little or no allowance for the religious freedom of entities and individuals, including Plaintiffs, who object to paying for or providing insurance coverage for such items.

52. An entity cannot freely avoid the Mandate by simply refusing to provide health insurance to its employees, because the PPACA imposes monetary penalties on entities that would so refuse to provide a health insurance plan.

53. The exact magnitude of these penalties may vary according to the complicated provisions of the PPACA, but the fine is approximately $2,000 per employee per year.

54. PPACA also imposes monetary penalties if Conestoga were to continue to offer its health insurance plan to employees but continued omitting abortifacients and contraceptives with an abortifacient effect.

55. The exact magnitude of these penalties may vary according to the complicated provisions of the PPACA, but the fine is approximately $100 per day

per employee, with minimum amounts applying in different circumstances.

56. If Plaintiffs do not submit to the Mandate they also trigger a range of enforcement mechanisms that exist under ERISA, including but not limited to civil actions by the Secretary of Labor or by plan participants and beneficiaries, which would include but not be limited to relief in the form of judicial orders mandating that Plaintiffs violate their sincerely held religious beliefs and provide coverage for items to which they religiously object.

57. The Mandate applies not only to sponsors of group health plans like Plaintiffs, but also to issuers of insurance. Accordingly, Plaintiffs cannot avoid the Mandate by shopping for an insurance plan that accommodates their right of conscience, because the Administration has intentionally foreclosed that possibility.

58. The Mandate offers the possibility of a narrow exemption to religious employers, but only if they meet all of the following requirements:

(1) "The inculcation of religious values is the purpose of the organization";

(2) "The organization primarily employs persons who share the religious tenets of the organization";

(3) "The organization serves primarily persons who share the religious tenets of the organization"; and

(4) The organization is a church, an integrated auxiliary of a church, a convention or association of churches, or is an exclusively religious activity of a religious order, under Internal Revenue Code 6033(a)(l) and (a)(3)(A).

59. Plaintiffs are deemed not "religious" enough by the Defendants under this definition in several respects, including but not limited to because they have purposes other than the "inculcation of religious values," they do not primarily hire or serve Mennonites, and because Conestoga is not a church, integrated auxiliary of a particular church, convention or association of a church, or the exclusively religious activities of a religious order.

60. The Mandate fails to protect the statutory and constitutional conscience rights of religious Americans like Plaintiffs even though those rights were repeatedly raised in the public comments.

61. The Mandate requires that Plaintiffs provide coverage for abortifacient methods and contraception with a possible abortifacient effect and counseling related to the same, against their conscience and in violation of their religious beliefs, in a manner that is contrary to law.

62. The Mandate constitutes government-imposed coercion on Plaintiffs to change or violate their sincerely held religious beliefs.

63. The Mandate exposes Plaintiffs to

substantial fines for refusal to change or violate their religious beliefs.

64. Plaintiffs have a sincere conscientious religious objection to providing coverage for abortifacients and contraception with an abortifacient effect and related education and counseling.

65. The Mandate does not apply equally to all religious adherents or groups.

66. PPACA and the Mandate are not generally applicable because they provide for numerous exemptions from their rules.

67. For instance, the Mandate does not apply to members of a "recognized religious sect or division" that conscientiously objects to acceptance of public or private insurance funds. See 26 U.S.C. §§ 5000A(d)(2)(a)(i) and (ii). Plaintiffs do not meet this exemption.

68. In addition, as described above, the Mandate exempts certain churches narrowly considered to be religious employers.

69. Furthermore, the PPACA creates a system of individualized exemptions because under the PPACA's authorization the federal government has granted discretionary compliance waivers to a variety of businesses for purely secular reasons.

70. The Mandate does not apply to employers

with preexisting plans that are "grandfathered."

71. Conestoga's plan is not grandfathered under PPACA, nor will its plan year that starts on January 1, 2013 have grandfathered status.

72. The Mandate does not apply through the employer mandate to employers having fewer than 50 full-time employees.

73. President Obama held a press conference on February 10,2012, and later (through Defendants) issued an "Advanced Notice of Proposed Rulemaking" ("ANPRM") on March 21, 2012 (77 Fed. Reg. 16501-08), claiming to offer a "compromise" under which some religious non-profit organizations not meeting the above definition would still have to comply with the Mandate, but by means of the employer's insurer offering the employer's employees the same coverage for "free."

74. This "compromise" is not helpful to Plaintiffs because, among other reasons, Conestoga is not a non-profit entity.

75. The ANPRM is neither a rule, a proposed rule, nor the specification of what a rule proposed in the future would actually contain. It in no way changes or alters the final status of the February 15, 2012 Mandate. It does not even create a legal requirement that Defendants change the Mandate at some time in the future.

76. On February 10, 2012 a document was also

issued from the Center for Consumer Information and Insurance Oversight (CCIIO), Centers for Medicare & Medicaid Services (CMS), of HHS, entitled "Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, and Section 9815(a)(1) of the Internal Revenue Code."

77. Under this "Guidance," an organization that truthfully declares "I certify that the organization is organized and operated as a non-profit entity; and that, at any point from February 10, 2012 onward, contraceptive coverage has not been provided by the plan, consistent with any applicable State law, because of the religious beliefs of the organization," and that provides a specified notice to plan participants, will not "be subject to any enforcement action by the Departments for failing to cover recommended contraceptive services without cost sharing in non-exempted, non-grandfathered group health plans established or maintained by an organization, including a group or association of employers within the meaning of section 3(5) of ERISA, (and any group health insurance coverage provided in connection with such plans)," until "the first plan year that begins on or after August 1, 2012."

78. The "Guidance" categorically disqualifies Plaintiffs from making use of this "extra year"

because, among other reasons, Conestoga is not a non-profit entity.

79. Therefore while President Obama's "compromise" and guidance purport to accommodate the religious beliefs of even more groups beyond the Mandate's initial exemption for churches, none of these measures will stop the Mandate from imposing its requirements on Plaintiffs' plan year beginning January 1, 2013.

80. The Mandate will have a profound and adverse effect on Plaintiffs and how they negotiate contracts and compensate their employees.

81. Any alleged interest Defendants have in providing free FDA-approved contraception and abortifacients without cost-sharing could be advanced through other, more narrowly tailored mechanisms that do not burden the religious beliefs of Plaintiffs and do not require them to provide or facilitate coverage of such items through their health plan.

82. Without injunctive and declaratory relief as requested herein, including preliminary injunctive relief issued on or before December 31, 2012, Plaintiffs are suffering and will continue to suffer irreparable harm.

83. Plaintiffs have no adequate remedy at law.

IV. Additional Factual Allegations

84. Conestoga's plan covers pregnancy related expenses, such as prenatal and post partum care, delivery, newborn care, routine GYN care including Pap test, mammogram annual screening, well woman visits, screening for gestational diabetes, human papilloma virus testing, human immunodeficiency virus screening and breast feeding support and supplies among other things. The plan does not consider pregnancy an excluded pre-existing condition.

85. Conestoga's plan has a wellness program for employees which includes promoting the health of women during and after pregnancy.

86. Conestoga's plan is not grandfathered under PPACA because for the January 2011 plan year, Conestoga did not provide notification to plan participants that its plan was considered grandfathered (because the plan was not considered grandfathered).

87. It would significantly injure Plaintiffs and their employees to require them to wait beyond December 31, 2012 to know whether their January 1, 2013 health plan will cover the items required by the Mandate.

88. Plaintiffs' decision on the plan's terms must be made based on knowing what items the plan will or will not cover and what levels of employee contributions will be needed to meet Conestoga's budget based on what services and supplies are covered by the plan.

89. If Plaintiffs were forced to add no cost sharing "contraceptives" including those that act to destroy early embryos, as well as patient education and counseling in facilitation of the aforementioned, all of which are required by the Mandate, Plaintiffs would have to take that inclusion into account at the time they decide what coverages and employee contributions the budget of Conestoga can afford.

90. Adding the Mandated items will require Conestoga to either eliminate coverage of other services included in the plan, increase employee contributions or possibly both.

91. Therefore, if Plaintiffs are not afforded prompt injunctive relief against the Mandate, they and their employees face imminent and irreparable injury.

92. On October 31, 2012, the Board of Directors adopted "The Hahn Family Statement on the Sanctity of Human Life." The statement provides that:

> "The Hahn family believes that the Bible is the inspired, infallible and authoritative written Word of God, the one and only eternal God.
>
> Found in the Bible, Exodus 20:13 (NIV) as one of the "Ten Commandments", God commands, "You shall not kill."
>
> Found in the Bible, Psalms, 139:13-16 (NIV),

the writer acknowledges God in how he was made and says ... "[13]For you created my inmost being; you knit me together in my mother's womb. [14]I will praise you because I am fearfully and wonderfully made; your works are wonderful, I know that full well. [15]My frame was not hidden from you when I was made in the secret place, when I was woven together in the depths of the earth. [16]Your eyes saw my unformed body; all the days obtained for me were written in your book before one of them came to be."

The Hahn Family believes that human life begins at conception (at the point where an egg and sperm unite) and that it is a sacred gift from God and only God has the right to terminate human life. Therefore it is against our moral conviction to be involved in the termination of human life through abortion, suicide, euthanasia, murder, or any other acts that involve the deliberate taking of human life."

FIRST CLAIM FOR RELIEF
Violation of the Religious Freedom Restoration Act
42 U.S.C. § 2000bb

93. Plaintiffs restate all matters set forth in the preceding paragraphs and incorporate them herein by reference.

94. Plaintiffs' sincerely held religious beliefs

prohibit them from providing coverage for abortifacients and contraception with a possible abortifacient effect as well as education and counseling promoting the same in their employee health plan.

95. When Plaintiffs comply with Mennonite and personally held ethical and moral teachings on abortifacients and with their sincerely held religious beliefs, they exercise religion within the meaning of the Religious Freedom Restoration Act.

96. The Mandate imposes a substantial burden on Plaintiffs' religious exercise and coerces them to change or violate their sincerely held religious beliefs.

97. The Mandate chills Plaintiffs' religious exercise within the meaning of RFRA.

98. The Mandate exposes Plaintiffs to substantial fines and/or financial burdens for their religious exercise.

99. The Mandate furthers no compelling governmental interest and is not narrowly tailored to any compelling governmental interest.

100. The Mandate is not the least restrictive means of furthering Defendants' stated interests.

101. The Mandate violates RFRA.

WHEREFORE, the Plaintiffs pray for the relief

set forth below in the prayer for relief.

SECOND CLAIM FOR RELIEF
Violation of Free Exercise Clause of the First Amendment to the United States Constitution

102. Plaintiffs restate all matters set forth in the preceding paragraphs and incorporate them herein by reference.

103. Plaintiffs' sincerely held religious beliefs prohibit them from providing coverage for abortifacients, contraception with even a possible abortifacient effect, and education and counseling promoting the same in their employee health plan.

104. When Plaintiffs comply with Mennonite and personally held ethical and moral teachings on abortifacients and with their sincerely held religious beliefs, they exercise religion within the meaning of the Free Exercise Clause.

105. The Mandate is not neutral and is not generally applicable.

106. Defendants have created categorical exemptions and individualized exemptions to the Mandate.

107. The Mandate furthers no compelling governmental interest.

108. The Mandate is not the least restrictive means of furthering Defendants' stated interests.

109. The Mandate coerces Plaintiffs to change or violate their sincerely held religious beliefs.

110. The Mandate chills Plaintiffs' religious exercise.

111. The Mandate exposes Plaintiffs to substantial fines and/or financial burdens for their religious exercise.

112. The Mandate imposes a substantial burden on Plaintiffs' religious exercise.

113. The Mandate is not narrowly tailored to any compelling governmental interest.

114. By design, Defendants framed the Mandate to apply to some religious Americans but not to others, resulting in discrimination among religions.

115. Defendants have created exemptions to the Mandate for some religious believers but not others based on characteristics of their beliefs and their religious exercise.

116. Defendants designed the Mandate, the religious exemption thereto, and the "compromise" and guidance allowances thereto, in a way that makes it impossible for Plaintiffs and other similar religious Americans to comply with their sincerely held religious beliefs.

117. Defendants promulgated both the Mandate

and the religious exemption/allowances with the purpose and intent to suppress the religious exercise of Plaintiffs and others.

118. The Mandate violates Plaintiffs' rights secured to them by the Free Exercise Clause of the First Amendment of the United States Constitution.

WHEREFORE, the Plaintiffs pray for the relief set forth below in the prayer for relief.

THIRD CLAIM FOR RELIEF
Violation of the Establishment Clause of the First Amendment to the United States Constitution

119. Plaintiffs restate all matters set forth in the preceding paragraphs and incorporate them herein by reference.

120. The First Amendment's Establishment Clause prohibits the establishment of any religion and/or excessive government entanglement with religion.

121. To determine whether religious persons or entities like Plaintiffs are required to comply with the Mandate, are required to continue to comply with the Mandate, are eligible for an exemption or other accommodations, or continue to be eligible for the same, Defendants must examine the religious beliefs and doctrinal teachings of persons or entities like Plaintiffs.

122. Obtaining sufficient information for the Defendants to analyze the content of Plaintiffs' sincerely held religious beliefs requires ongoing, comprehensive government surveillance that impermissibly entangles Defendants with religion.

123. The Mandate discriminates among religions and among denominations, favoring some over others, and exhibits a hostility to religious beliefs.

124. The Mandate adopts a particular theological view of what is acceptable moral complicity in provision of abortifacients and imposes it upon all people of religion who must either conform their consciences or suffer penalty.

125. The Mandate violates Plaintiffs' rights secured to them by the Establishment Clause of the First Amendment of the United States Constitution.

WHEREFORE, the Plaintiffs pray for the relief set forth below in the prayer for relief.

FOURTH CLAIM FOR RELIEF
Violation of the Free Speech Clause of the First Amendment to the United States Constitution

126. Plaintiffs restate all matters set forth in the preceding paragraphs and incorporate them herein by reference.

127. Defendants' requirement of provision of

insurance coverage for education and counseling regarding contraception with an abortifacient effect and other abortion causing drugs forces Plaintiffs to speak in a manner contrary to their religious beliefs.

128. Defendants have no narrowly tailored compelling interest to justify this compelled speech.

129. The Mandate violates Plaintiffs' rights secured to them by the Free Speech Clause of the First Amendment of the United States Constitution.

WHEREFORE, the Plaintiffs pray for the relief set forth below in the prayer for relief.

FIFTH CLAIM FOR RELIEF
Violation of the Due Process Clause of the Fifth Amendment to the United States Constitution

130. Plaintiffs restate all matters set forth in the preceding paragraphs and incorporate them herein by reference.

131. Because the Mandate sweepingly infringes upon religious exercise and speech rights that are constitutionally protected, it is unconstitutionally vague and overbroad in violation of the due process rights of Plaintiffs and other parties not before the Court.

132. Persons of common intelligence must necessarily guess at the meaning, scope, and application of the Mandate and its exemptions.

133. This Mandate lends itself to discriminatory enforcement by government officials in an arbitrary and capricious manner.

134. The Mandate vests Defendants with unbridled discretion in deciding whether to allow exemptions to some, all, or no organizations meeting whatever definition of "religious employers" it decides to craft.

135. This Mandate is an unconstitutional violation of Plaintiffs' due process rights under the Fifth Amendment to the United States Constitution.

WHEREFORE, the Plaintiffs pray for the relief set forth below in the prayer for relief.

SIXTH CLAIM FOR RELIEF
Violation of the Administrative Procedure Act

136. Plaintiffs restate all matters set forth in the preceding paragraphs and incorporate them herein by reference.

137. Because they did not give proper notice and an opportunity for public comment, Defendants did not take into account the full implications of the regulations by completing a meaningful consideration of the relevant matter presented.

138. Defendants did not consider or respond to the voluminous comments they received in opposition to the interim final rule.

139. Therefore, Defendants have taken agency action not in accordance with procedures required by law, and Plaintiffs are entitled to relief pursuant to 5 U.S.C. § 706(2)(D).

140. In promulgating the Mandate, Defendants failed to consider the constitutional and statutory implications of the Mandate on Plaintiffs and similar persons.

141. Defendants' explanation (and lack thereof) for its decision not to exempt Plaintiffs and similar religious organizations from the Mandate runs counter to the evidence submitted by religious Americans during the comment period.

142. Thus, Defendants' issuance of the Mandate was arbitrary and capricious within the meaning of 5 U.S.C. § 706(2)(A) because the Mandate fails to consider the full extent of its implications and it does not take into consideration the evidence against it.

143. As set forth above, the Mandate violates RFRA and the First and Fifth Amendments.

144. The Mandate is also contrary to the provisions of the PPACA which states that "nothing in this title"—i.e., title I of the Act, which includes the provision dealing with "preventive services"—"shall be construed to require a qualified health plan to provide coverage of [abortion] services ... as part of its essential health benefits for any plan year." Section 1303(b)(1)(A). Some drugs included as "FDA

approved contraceptives" under the Mandate cause abortions by causing the demise of human embryos before and/or after attachment to the uterus.

145. The Mandate is also contrary to the provisions of the Weldon Amendment of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009, Public Law 110 329, Div. A, Sec. 101, 122 Stat. 3574, 3575 (Sept. 30, 2008), which provides that "[n]one of the funds made available in this Act [making appropriations for Defendants Department of Labor and Health and Human Services] may be made available to a Federal agency or program ... if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions."

146. The Mandate also violates the provisions of the Church Amendment, 42 U.S.C. § 300a-7(d), which provides that "No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions."

147. The Mandate is contrary to existing law and is in violation of the APA under 5 U.S.C. § 706(2)(A)f.

WHEREFORE, the Plaintiffs pray for the relief set forth below in the prayer for relief.

PRAYER FOR RELIEF

Plaintiffs respectfully request the following relief:

146. That this Court enter a judgment declaring the Mandate and its application to Plaintiffs and others similarly situated but not before the Court to be an unconstitutional violation of their rights protected by RFRA, the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment to the United States Constitution, the Due Process Clause of the Fifth Amendment to the United States Constitution, and the Administrative Procedure Act, and therefore invalid in any way applicable to them;

147. That this Court enter a preliminary and a permanent injunction prohibiting Defendants from applying the Mandate to Plaintiffs, their insurance carrier, individuals covered under the plan or any person similarly situated, but not before the Court in a way that substantially burdens the religious belief of Plaintiffs or any person in violation of RFRA and the Constitution, and prohibiting Defendants from continuing to illegally discriminate against Plaintiffs and others not before the Court by requiring them to provide health insurance coverage for abortifacients and contraception with an abortifacient effect and education and counseling promoting the same to their employees;

148. That this Court award Plaintiffs court costs and reasonable attorney's fees, as provided by the Equal Access to Justice Act and RFRA (as provided in 42 U.S.C. § 1988);

149. That this Court grant such other and further relief as to which the Plaintiffs may be entitled.

150. Plaintiffs demand a jury trial on all issues qualified for trial.

Respectfully submitted this 11th day of January, 2013.

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VERIFICATION OF FIRST AMENDED VERIFIED COMPLAINT PURSUANT TO 28 U.S.C. § 1746‡

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on 1-10-13

Conestoga Wood Specialties Corp.

Anthony Hahn

By: Anthony H. Hahn
President

VERIFICATION OF FIRST AMENDED VERIFIED COMPLAINT PURSUANT TO 28 U.S.C. § 1746‡

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on 1-10-13

Norman Hahn
Norman Hahn

VERIFICATION OF FIRST AMENDED VERIFIED COMPLAINT PURSUANT TO 28 U.S.C. § 1746‡

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on 1-10-13

Elizabeth Hahn
Elizabeth Hahn

VERIFICATION OF FIRST AMENDED VERIFIED COMPLAINT PURSUANT TO 28 U.S.C. § 1746‡

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on 1-10-13

Kevin Hahn
Kevin Hahn

UNITED STATES DISTRICT COURT
for the
Eastern District of Pennsylvania

CONESTOGA WOOD SPECIALTIES CORP., *Plaintiffs,*	)	Civil Action No. 5:12-CV-06744-MSG
v.	)	
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF TREASURY; KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; HILDA SOLIS, in her official capacity as Secretary of the United States Department of Labor; and TIMOTHY GEITHNER, in his official capacity as Secretary of the United States Department of Treasury.	)	

)

Defendants.)

CERTIFICATION OF SERVICE

The undersigned counsel for Plaintiffs, Charles W. Proctor, III, Esquire, hereby certifies that the following counsel for Defendants were served with Plaintiffs' First Amended Verified Complaint document by the Court's ECF filing system on January 11th 2013:

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Charles W. Proctor, III, Esquire
Charles W. Proctor, III, Esquire

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

CONESTOGA WOOD SPECIALTIES CORPORATION, et al.,	)
Plaintiffs,	)5:12-cv-06744-MSG
vs.	)
	)Allentown, PA
Sebelius, et al.,	)January 4, 2013
Defendants.	)
	)

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE
MITCHELL S. GOLDBERG
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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* * *

MR. PROCTOR: In addition, the five voting stockholders have all worked in the business and, with the exception of very, very recently, have only worked in the business. One brother is currently not working in the business but that's the only place they've ever worked their whole life. Dad, mom, the three brothers, have all worked that business from the day they got out of high school to today. And, as a result, their creation of a corporation in 1964, at a time when the Religious Freedom Reformation Act, RUPA, OSHA, the EPA did not even exist. They had not thought of any of those issues. And it was created more for tax and personal liability issues as

opposed to exercising their religious freedom or being for-profit. It was a strict business decision, guided by their attorneys and their accountants. And at the same time, Your Honor, they are a Sub S Corporation. And being a Sub S Corporation allows for pass-through of any profits directly to those five stockholders. It shows up on their tax return. They are the same as the corporation. They direct it. Earlier, before the hearing started, I gave Ms. Bennett a copy of the mission statement, the value statement and the sanctity of human life statement that the Hahns believe in and use to operate their business.

THE COURT: Are those docu -- those -- do you want to make those documents part of the record?

MR. PROCTOR: Yes, I would like to, Your Honor.

THE COURT: Is there any objection to their admission?

MS. BENNETT: No, Your Honor.

THE COURT: All right. We'll mark those -- and you don't have to do it now. You can do it at a break or at the end of the day --

MR. PROCTOR: All right. Thank you.

THE COURT: -- because we're right in the middle of a discussion but mark those Plaintiffs -- whatever you want to mark them. Just mark them as --

MR. PROCTOR: Plaintiffs 1 through 5, Your Honor.

THE COURT: 1 through 5, okay. They're admitted. So the import of the Sub S structure, as it relates to the issues here, is what?

MR. PROCTOR: The import shows that the continuity, the nexus, the connection between the Hahns who work the business, who created the

business, who their whole life is devoted to the business, and the fact that the corporate structure -- unlike what the government says, there isn't layer upon layer here. It's transparent. They are the business. And, Your Honor, in 1 U.S.C. CA-1, when Congress does not give a definition, a corporation is deemed the same as a person. In 15 Pa. C.S.A., I believe it's section 1500, again, the Pennsylvania -- the Commonwealth of Pennsylvania recognizes a corporation as a person and goes on, in that act, to list twenty different things that a corporation can do, including --

THE COURT: Well, what is --

MR. PROCTOR: -- sue and be sued.

THE COURT: What is -- does RFRA refer to a corporation?

MR. PROCTOR: Not directly, Your Honor. But in --

* * *

MR. PROCTOR: 7,832.

THE COURT: Okay.

MR. PROCTOR: And their sons, Anthony, Kevin and Norman, each own 928 respectively.

THE COURT: 928.

MR. PROCTOR: Yes.

THE COURT: Okay. And Ms. Bennett, again, any time you want to jump in and be heard on any of these issues, let me know.

MS. BENNETT: Your Honor, actually, can I speak to the --

THE COURT: Yes.

MS. BENNETT: -- corporate structure we just discussed?

THE COURT: You can. Yep.
MS. BENNETT: Your Honor, plaintiffs' assert that because they're an S Corporation, they're unlike any other corporations and the owners and the corporation merge. We point out that an S Corporation, although it does provide certain tax benefits, for most purposes, the corporation is still separate from the individual owners, including liability. In fact, in our brief, we cite a case – a Pennsylvania case, which this is a Pennsylvania corporation, that says "even when a corporation is owned by one person or a family, the corporate form shields the individual members of the corporation from personal liability." So again, Your Honor, our point is that the Hahns are separate from the corporation they've created. The regulations apply to the corporation. It doesn't matter that it's an S Corporation or -- it only matters that it's a secular corporation. With respect to --
THE COURT: And let me touch on that. And -- I think a lot of these issues are very thoroughly briefed and I understand the parties' positions. It's a fascinating case so the discussion with the attorneys, I think, will be helpful and, I think, interesting. But Mr. Proctor, I mean that a -- your clients made a decision to avail themselves to the benefits of a corporate structure.

* * *

FDA Birth Control: Medicines to Help You
For Consumers

Birth Control: Medicines To Help You
Introduction

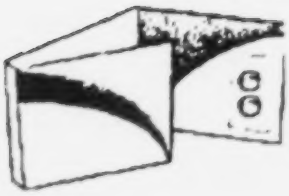
If you do not want to get pregnant, there are many birth control options to choose from. No one product is best for everyone. The only sure way to avoid pregnancy and sexually transmitted infections (STIs or STDs) is not to have any sexual contact (abstinence). This guide lists FDA-approved products for birth control. Talk to your doctor, nurse, or pharmacist about the best method for you.

There are different kinds of medicines and devices for birth control:
Barrier Methods
Hormonal Methods
Emergency Contraception
Implanted Devices
Permanent Methods

* * *

EMERGENCY CONTRACEPTION: May be used if you did not use birth control or if your regular birth control fails. It should not be used as a regular form of birth control

Plan B, Plan B One- Step and Next Choice (Levonorgestrel)



What is it?

- These are pills with the hormone progestin.
- They help prevent pregnancy after birth control failure or unprotected sex.

How does it work?

- It works mainly by stopping the release of an egg from the ovary. It may also work by preventing fertilization of an egg (the uniting of sperm with the egg) or by preventing attachment (implantation) to the womb (uterus).
- For the best chance for it to work, you should start taking the pill(s) as soon as possible after unprotected sex.
- You should take emergency contraception within three days after having unprotected sex.

How do I get it?

- You can buy **Plan B One-Step** over-the-counter. You do not need a prescription.
- You can buy Plan B and Next Choice over-the-counter if you are age 17 years or older. If you are younger than age 17, you need a prescription.

Chance of getting pregnant

- Seven out of every 8 women who would have gotten pregnant will not become pregnant

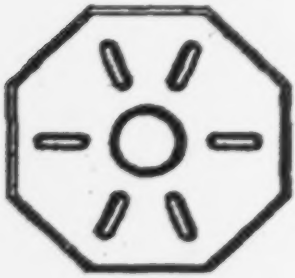
after taking Plan B, Plan B One-Step, or Next Choice.

Some Risks

- Nausea, vomiting, abdominal pain, fatigue and headache

Does it protect me from sexually transmitted infections (STIs)? No.

Ella (ulipristal acetate)



What is it?

- A pill that blocks the hormone progesterone.
- It helps prevent pregnancy after birth control failure or unprotected sex.
- It works mainly by stopping or delaying the ovaries from releasing an egg. It may also work by changing the lining of the womb (uterus) that may prevent attachment (implantation).

How do I use it?

- For the best chance for it to work, you should take the pill as soon as possible after unprotected sex.
- You should take Ella within five days after unprotected sex.

How do I get it?

- You need a prescription.

Chance of getting pregnant

- Six or 7 out of every 10 women who would have gotten pregnant will not become pregnant after taking ella.

Some Risks

- Headache
- Nausea
- Abdominal pain
- Menstrual pain
- Tiredness
- Dizziness

Does it protect me from sexually transmitted infections (STIs)? No.

IMPLANTED DEVICES: Inserted/implanted into the body and can be kept in place for several years

Copper IUD

What is it?

- A T-shaped device containing copper that is put into the uterus by a healthcare provider.

How does it work?

- The IUD prevents sperm from reaching the

egg, from fertilizing the egg, and may prevent the egg from attaching (implanting) in the womb (uterus).

- It does not stop the ovaries from making an egg each month.
- The Copper IUD can be used for up to 10 years.
- After the IUD is taken out, it is possible to get pregnant.

How do I get it?

- A doctor or other healthcare provider needs to put in the IUD.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

- Out of 100 women who use this method, less than 1 may get pregnant.

Some Side Effects

- Cramps
- Irregular bleeding

Uncommon Risks

- Pelvic inflammatory disease
- Infertility

Rare Risk

- IUD is stuck in the uterus or found outside the uterus.
- Life-threatening infection.

Does it protect me from sexually transmitted infections (STIs)? No.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

GENEVA COLLEGE; WAYNE L. HEPLER; THE SENECA HARDWOOD LUMBER COMPANY, INC., a Pennsylvania Corporation; WLH ENTERPRISES, a Pennsylvania Sole Proprietorship of Wayne L. Hepler; and CARRIE E. KOLESAR; Plaintiffs	))))))))))))Case No. 2:12-cv-00207-JFC
v.	)Judge Joy Flowers Conti
KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; HILDA SOLIS In her official capacity as Secretary of the United States Department of Labor; TIMOTHY GEITHNER, in his Official capacity as Secretary of the United States Department of the Treasury; UNITED	))))))))))))

STATES DEPARTMENT)
OF HEALTH AND)
HUMAN SERVICES;)
UNITED STATES)
DEPARTMENT OF)
LABOR; and UNITED)
STATES DEPARTMENT)
OF THE TREASURY,)
)
Defendants.)

FED.R.CIV.P.26(f) REPORT OF THE PARTIES

Pursuant to Fed. R. Civ. P. 26(f), the parties submit this Joint Rule 26(f) report for consideration by the Court.

1. **Identification of counsel and unrepresented parties.** Set forth the names, addresses, telephone and fax numbers and e-mail addresses of each unrepresented party and of each counsel and identify the parties whom such counsel represent:

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* * *

8. Subjects on which fact discovery may be needed. (By executing this report, no party shall be deemed to (1) have waived the right to conduct discovery on subjects not listed herein or (2) be required to first seek the permission of the Court to conduct discovery with regard to subjects not listed herein):

The parties believe that there are no subjects on which fact discovery may be needed.

* * *

Respectfully submitted this 11th day of April, 2012.

s/ Matthew S. Bowman, with respect to assertions herein of the joint positions of the parties and of the positions attributed to Plaintiffs

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Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to counsel for Defendants.

s/ Matthew S. Bowman

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

TYNDALE HOUSE PUBLISHERS, INC.; MARK D. TAYLOR,	)	
Plaintiffs,	)	
	)	**Case No. 1:12-cv-163 RBW**
v.	)	
KATHLEEN SEBELIUS, et al.,	)	
Defendants.	)	

DEFENDANTS' STATEMENT OF MATERIAL FACTS

Pursuant to Local Civil Rule 7(h), defendants hereby submit the following statement of material facts as to which defendants contend there is no genuine issue in connection with their motion for summary judgment under Rule 56(b) of the Federal Rules of Civil Procedure[1]:

1. Due largely to cost, American women used preventive services at about half the recommended rate. *See* INST. OF MED., CLINICAL PREVENTIVE

[1] The facts provided by defendants here are in addition to those facts provided by plaintiffs in their Statement of Material Facts, ECF No. 36, that are undisputed by defendants (i.e. those facts not listed in Defendants' Response to Plaintiff's Statement of Material Facts, ECF No. 41-1).

SERVICES FOR WOMEN: CLOSING THE GAPS 19-20, 109 (2011) ("IOM REP."), *available at* http://www.nap.edu/catalog.php?record_id=13181 (last visited June 17, 2013), AR 346-347, 436.[2]

2. Section 1001 of the Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), requires all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage to provide coverage for certain preventive services without cost-sharing, including, "[for] women, such additional preventive care and screenings ... as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [(HRSA)]." 42 U.S.C. § 300gg-13(a)(4).

3. The government issued interim final regulations implementing the preventive services coverage provision on July 19, 2010. 75 Fed. Reg. 41,726, AR 1-35.

4. Those regulations provide, among other things, that a group health plan or health insurance issuer offering non-grandfathered health coverage must provide coverage for recommended preventive services, without cost-sharing, for plan years that begin on or after the date that is one year after the

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[2] Where possible, defendants provide parallel citations to the Administrative Record ("AR"), which was filed on June 17, 2013. *See* Notice of Filing of Certified Administrative Record, ECF No. 40.

date on which the new recommendation is issued. 26 C.F.R. § 54.9815-2713T(b)(1); 29 C.F.R. § 2590.715-2713(b)(1); 45 C.F.R. § 147.130(b)(1).

5. Because there were no existing HRSA guidelines relating to preventive care and screening for women, HHS tasked the Institute of Medicine (IOM) with developing recommendations with respect to women's preventive services. IOM REP. at 2, AR 329.

6. After an extensive science-based review, IOM recommended that HRSA guidelines include "the full range of [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity," as prescribed by a health care provider. IOM REP. at 10-12, AR 337-339

7. FDA-approved contraceptive methods include diaphragms, oral contraceptive pills, emergency contraceptives (such as Plan B and Ella), and intrauterine devices (IUDs). FDA, Birth Control Guide, *available at* http://www.fda.gov/forconsumers/byaudience/forwomen/ucm118465.htm (last visited Feb. 25, 2013).

8. IOM determined that coverage, without cost-sharing, for these services is necessary to increase access to these services, and thereby reduce unintended pregnancies (and the negative health outcomes that disproportionately accompany unintended pregnancies) and promote healthy birth spacing. IOM REP. at 102-03, AR 429-430.

9. On August 1, 2011, HRSA adopted IOM's recommendations, subject to an exemption relating to certain religious employers authorized by an amendment to the interim final regulations. *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), *available at* http://www.hrsa.gov/womensguidelines/ (last visited June 17, 2013), AR 56-57.

10. The amendment, issued the same day, authorized HRSA to exempt from its recommendations women in group health plans established or maintained by certain religious employers (and any associated group health insurance coverage), thereby exempting such plans from any requirement to cover contraceptive services under HRSA's guidelines. 76 Fed. Reg. 46,621 (Aug. 3, 2011), AR 38-43; 45 C.F.R. § 147.130(a)(1)(iv)(A).

11. To qualify, an employer must meet all of the following criteria: (1) The inculcation of religious values is the purpose of the organization; (2) the organization primarily employs persons who share the religious tenets of the organization; (3) the organization serves primarily persons who share the religious tenets of the organization, and (4) the organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended. 45 C.F.R. § 147.130(a)(1)(iv)(B). However, a recently published Notice of Proposed Rulemaking (NPRM) would eliminate the first three criteria and modify the fourth criterion, thereby ensuring "that

an otherwise exempt employer plan is not disqualified because the employer's purposes extend beyond the inculcation of religious values or because the employer serves or hires people of different religious faiths." 78 Fed. Reg. 8456, 8459 (Feb. 6, 2013); *see also id.* at 8474.

12. The religious employer exemption was modeled after a religious accommodation adopted by multiple states that already required health insurance issuers to cover contraception. 76 Fed. Reg. at 46,623, AR 40.

13. Defendants requested comments for a period of 60 days on the amendment to the regulations and specifically on the definition of "religious employer" contained in the exemption authorized by the amendment. 76 Fed. Reg. at 46,621, AR 38.

14. After receiving and carefully considering thousands of comments, in February 2012, the government adopted in final regulations the definition of "religious employer" contained in the amended interim final regulations while also creating a temporary enforcement safe harbor for non-grandfathered group health plans sponsored by certain non-profit organizations with religious objections to contraceptive coverage (and any associated group health insurance coverage). 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012), AR 47-48.

15. During the safe harbor, the government intends to amend the preventive services coverage regulations to further accommodate nonprofit

religious organizations' religious objections to covering contraceptive services. 77 Fed. Reg. at 8728, AR 49.

16. The government began the process of further amending the regulations on March 21, 2012, when it published an Advance Notice of Proposed Rulemaking ("ANPRM") in the Federal Register, 77 Fed. Reg. 16,501 (Mar. 21, 2012), and took the next step in that process with the publication of a Notice of Proposed Rulemaking (NPRM), 78 Fed. Reg. 8456 (Feb. 6, 2013).

17. The proposed accommodations do not extend to for-profit corporations such as Tyndale. *See* 78 Fed. Reg. at 8462. The Departments explained that "[r]eligious accommodations in related areas of federal law, such as the exemption for religious organizations under Title VII of the Civil Rights Act of 1964, are available to nonprofit religious organizations but not to for-profit secular organizations." *Id.* Consistent with these longstanding provisions, the Departments proposed to limit the definition of organizations eligible for the proposed accommodations "to include nonprofit religious organizations, but not to include for-profit secular organizations." *Id.*

18. A primary predicted benefit of the preventive services coverage regulations is that "individuals will experience improved health as a result of reduced transmission, prevention or delayed onset, and earlier treatment of disease." 75 Fed. Reg. at 41,733, AR 8; *see also* 77 Fed. Reg. at 8728, AR 49.

19. The Departments concluded that, "[b]y expanding coverage and eliminating cost sharing for recommended preventive services, these interim final regulations could be expected to increase access to and utilization of these services, which are not used at optimal levels today." 75 Fed. Reg. at 41,733, AR 8.

20. Increased access to contraceptive services is a key part of these predicted health outcomes, as a lack of contraceptive use has proven to have negative health consequences for both women and a developing fetus. As IOM concluded in identifying services recommended to "prevent conditions harmful to women's health and well-being," unintended pregnancy may delay "entry into prenatal care," prolong "behaviors that present risks for the developing fetus," and cause "depression, anxiety, or other conditions." IOM REP. at 20, 103, AR 347, 430.

21. Contraceptive coverage also helps to avoid "the increased risk of adverse pregnancy outcomes for pregnancies that are too closely spaced." IOM REP. at 103, AR 430. In fact, "pregnancy may be contraindicated for women with serious medical conditions such as pulmonary hypertension . . . and cyanotic heart disease, and for women with the Marfan Syndrome." IOM REP. at 103-04, AR 430-431.

22. By including in the ACA preventive health services for women, Congress made clear that the

goals and benefits of effective preventive health care apply with equal force to women, who might otherwise be excluded from such benefits if their unique health care needs were not taken into account. As explained by members of Congress, "women have different health needs than men, and these needs often generate additional costs. Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men." *See* 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009); *see also* 155 Cong. Rec. S12265-02, S12269 (daily ed. Dec. 3, 2009); IOM REP. at 19, AR 346.

23. These costs resulted in women often forgoing preventive care. *See, e.g.*, 155 Cong. Rec. S12265-02, S12274. Accordingly, this disproportionate burden on women created "financial barriers ... that prevent[ed] women from achieving health and well-being for themselves and their families." IOM REP. at 20, AR 347.

24. Congress's goal was to equalize the provision of health care for women and men in the area of preventive care, including the provision of family planning services for women. *See, e.g.*, 155 Cong. Rec. S12265-02, S12271; *see also* 77 Fed. Reg. at 8728, AR 49.

25. A grandfathered plan is one that was in existence on March 23, 2010, and that has not undergone any of a defined set of changes. *See, e.g.*, 45 C.F.R. § 147.140.

26. The grandfathering of certain health plans

with respect to certain provisions of the ACA is not limited to the preventive services coverage provision. *See* 42 U.S.C. § 18011; 45 C.F.R. § 147.140.

27. The grandfathering provision reflects Congress's attempt to balance competing interests – specifically, the interest in spreading the benefits of the ACA, including those provided by the preventive services coverage provision, and the interest in maintaining existing coverage and easing the transition into the new regulatory regime established by the ACA – in the context of a complex statutory scheme. *See* 75 Fed. Reg. at 34,540, 34,546 (June 17, 2010).

28. Defendants estimate that a majority of group health plans will lose their grandfathered status by the end of 2013. *See* 75 Fed. Reg. at 34,552; *see also* Kaiser Family Foundation and Health Research & Educational Trust, Employer Health Benefits 2012 Annual Survey at 7-8, 190, *available at* http://kaiserfamilyfoundation.files.wordpress.com/2013/03/ 8345-employer-health-benefits-annual-survey-full-report-0912.pdf (last visited June 17, 2013), AR 122-123, 305. By 2012, for example, the year in which the contraceptive coverage requirement was first imposed, the government's mid-range estimate is that 38 percent of employer plans lost grandfathered status, and by the end of 2013, this mid-range estimate increases to 51 percent. 75 Fed. Reg. at 34,553.

29. Small businesses that offer non-grandfathered health coverage to their employees

are required to provide coverage for recommended preventive services, including contraceptive services, without cost-sharing, subject to the religious employer exemption. *See* 26 U.S.C. § 4980H9(c)(2); 42 U.S.C. § 300gg-13(a); 76 Fed. Reg. at 46,622 n.1, AR 39.

30. Beginning in 2014, certain large employers face assessable payments if they fail to provide health coverage for their full-time employees under certain circumstances. 26 U.S.C. § 4980H. Employers with fewer than fifty full-time equivalent employees are excluded from the employer responsibility provision, meaning that, starting in 2014, such employers are not subject to assessable payments if they do not provide health coverage to their full-time employees and certain other criteria are met. 26 U.S.C. § 4980H9(c)(2).

31. Employees of small businesses that do not provide health coverage to their employees can get affordable health insurance by operation of other ACA provisions concerning health insurance exchanges and premium tax credits and cost-sharing reductions, and the coverage they receive will include all recommended preventive services, including contraception. *See* 42 U.S.C. § 18021; 42 U.S.C. § 13031(d)(2)(B)(i); 42 U.S.C. §§ 18032(a), (f); 26 U.S.C. § 36B; 42 U.S.C. § 18082.

32. The ACA provides for tax incentives for small businesses to encourage the purchase of health insurance for their employees. *See* 26 U.S.C. § 45R.

33. 26 U.S.C. § 5000A(d)(2)(A) exempts from the

minimum coverage provision of the ACA those "member[s] of a recognized religious sect or division thereof" who, on the basis of their religion, are opposed to the concept of health insurance, *see also id.* § 1402(g).

34. 26 U.S.C. § 5000A(d)(2)(A) is unrelated to the preventive services coverage regulations. It only excludes certain individuals from the requirement to obtain health coverage or pay a tax penalty, and says nothing about the requirement that non-exempt, non-grandfathered group health plans provide recommended preventive services coverage to their participants and beneficiaries. *See* 26 U.S.C. § 5000A(d)(2)(A).

Respectfully submitted this 17th day of June, 2013,

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2013, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

/s/ Benjamin L. Berwick

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Pending Contraceptive-Coverage Mandate Cases

Am. Pulverizer Co. v. Dep't of Health & Human Servs., No. 12-3459-cv-S-RED (W.D. Mo. filed Oct. 19. 2012)

Annex Medical, Inc. v. Sebelius, No. 12-cv-02804-DSD-SER (D. Minn. filed Nov. 2, 2012)

Autcocam Corp. v. Sebelius, No. 1:12-cv-01096 (W.D. Mich. filed Oct. 8, 2012)

Beckwith Elec. Co., Inc. v. Sebelius, No. 8:13-cv-0648-T-17MAP (M.D. Fla. filed June 25, 2013)

Bick Holdings, Inc. v. Sebelius, No. 4:13-cv-00462-AGF (E.D. Mo. filed Mar. 13, 2013)

Briscoe v. Sebelius, No. 1:13-cv-00285 (D. Colo. filed Feb. 4, 2013)

Domino's Farms Corp. v. Sebelius, No. 2:12-cv-15488-LPZ-MJH (E.D. Mich. filed Dec. 14, 2012)

Eden Foods, Inc. v. Sebelius, No. 2:13-cv-11229-DPH-MAR (E.D. Mich. filed Mar. 20, 2013)

Geneva Coll. v. Sebelius, No. 2:12-cv-00207-JFC (W.D. Pa. filed Feb. 21, 2012)

Gilardi v. Sebelius, No. 1:13-cv-00104-EGS (D.D.C. filed Jan. 24, 2013)

Grote Indus., LLC v. Sebelius, No. 4:12-cv-00134-SEB-DML (S.D. Ind. filed Oct. 29, 2012)

Hobby Lobby Stores, Inc. v. Sebelius, No. 5:12-cv-01000-HE (W.D. Okla. filed Sept. 12, 2012)

Infrastructure Alternatives v. Sebelius, No. 1:13-cv-31 (W.D. Mich. filed Jan. 10, 2013)

Korte v. Sebelius, No. 3:12-cv-01072-MJR-PMF (S.D. Ill. filed Oct. 9, 2012)

Hall v. Sebelius, No. 13-cv-00295-JRT-LIB (D. Minn. filed Feb. 5, 2013)

Hartenbower v. U.S. Dep't of Health & Human Servs., No. 1:13-cv-02253 (N.D. Ill. filed Mar. 26, 2013)

Holland v. Dep't of Health & Human Servs., No. 2:13-cv-11111 (S.D. W. Va. filed June 24, 2013)

Johnson Welded Prods., Inc. v. Sebelius, No. 1:13-cv-00609-ESH (D.D.C. filed Apr. 30, 2013)

Legatus v. Sebelius, No. 2:12-cv-12061-RHC-MJH (E.D. Mich. filed May 7, 2012)

Lindsay v. U.S. Dep't of Health & Human Servs., No. 1:13-cv-01210 (N.D. Ill. filed Feb. 14, 2013)

Mersino Mgmt. Co. v. Sebelius, No. 2:13-cv-11296-PDB-RSW (E.D. Mich. filed Mar. 22, 2013)

MK Chambers, Co. v. Dep't of Health & Human Servs., No. 2:13-cv-11379-DPH-MJH (E.D. Mich. filed Mar. 28, 2013)

M&N Plastics, Inc. v. Sebelius, No. 2:13-cv-12036-VAR-DRG (E.D. Mich. filed May 8, 2013)

Newland v. Sebelius, No. 1:12-cv-01123-JLK (D. Colo. filed Apr. 30, 2012)

O'Brien v. U.S. Dep't of Health & Human Servs., No. 4:12-cv-00476-CEJ (E.D. Mo. filed Mar. 15, 2012)

Ozinga v. Dep't of Health & Human Servs., No. 1:13-cv-03292 (N.D. Ill. filed July 12, 2013)

Sharpe Holdings, Inc. v. Dep't of Health & Human Servs., No. 2:12-cv-00092 (E.D. Mo. filed Dec. 20, 2012)

Sioux Chief Mfg. Co. v. Sebelius, No. 4:13-cv-00036-ODF (W.D. Mo. filed Jan. 14, 2013)

SMA, LLC v. Sebelius, No. 13-CV-01375 (D. Minn. June 7, 2013)

The QC Group, Inc. v. Sebelius, No. 13-cv-01726-JRT-SER (D. Minn. filed July 2, 2013)

Tonn & Blank Cosntr., LLC v. Sebelius, No. 1:12-cv-325-JD (N.D. Ind. filed Sept. 20, 2012)

Trijicon, Inc. v. Sebelius, No. 1:13-cv-1207-EGS (D.D.C. filed Aug. 5, 2013)

Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs., No. 1:12-cv-06756 (N.D. Ill. filed Aug. 22, 2012)

Tyndale House Publishers, Inc. v. Sebelius, No. 1:12-cv-1635 (D.D.C. filed Oct. 2, 2012)

Willis & Willis, PLC v. Sebelius, No. 1:13-cv-01124 (D.D.C. filed July 24, 2013)